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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. _____

R. M. SMITH,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RENEE M. SMITH
P.O. BOX 2334
WINTERSVILLE, OH 43953
(740) 264-6986
Pro Se Petitioner

133 pp

QUESTIONS PRESENTED

I.

Whether the Sherman Act reaches the National Collegiate Athletic Association's eligibility bylaws where student-athletes are persons in interstate commerce and intercollegiate athletics is an activity substantially affecting interstate commerce when the reach of the Sherman Act is as broad as Congress' powers under the Commerce Clause?

II.

Whether the interstate commerce requirement of antitrust jurisdiction is satisfied by allegations that Respondents conspired to exclude Petitioner, an otherwise eligible student-athlete, from participating in intercollegiate athletics, reduce services available to consumers, and lessen competition as a direct result of the restraint?

III.

Whether the NCAA bylaws should be analyzed under the "rule of reason" where a student-athlete, who had two remaining years of eligibility, was denied the opportunity to compete because she completed her bachelor's degree in two and one-half years and transferred into a postbaccalaureate program that was not offered at her undergraduate institution when less restrictive alternatives were available?

LIST OF PARTIES TO THE PROCEEDING

In addition to the National Collegiate Athletic Association, both the University of Pittsburgh, Pittsburgh, Pennsylvania, and Hofstra University, Hempstead, NY have been added as defendants under the Amended Complaint, and were served with this document on June 3, 1998. App. 44a.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, R. M. Smith, is a Pro Se Plaintiff. Ms. Smith seeks certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit. This decision completely excludes National Collegiate Athletic Association's eligibility bylaws from the reach of Sherman Act.

OPINIONS BELOW

The opinion and judgment of the Third Circuit, entered on March 16, 1998, is reported at 139 F.3d 180 (3d Cir. 1998) and is reprinted in the Appendix at pages 1a-26a. The Plaintiff's Petition for Rehearing and Rehearing *en Banc* and the Defendant's Petition for Rehearing and Suggestion for Rehearing *In Banc* were denied without comment on April 20, 1998. (App. 27a). The opinion and order of the United States District Court for the Western District of Pennsylvania, entered on May 21, 1997, granting the National Collegiate Athletic Association's Motion to Dismiss, is reported at 978 F. Supp. 213 (W.D. Pa. 1997), and is reprinted in the Appendix at pages 28a - 44a. On May 30, 1997, Plaintiff filed a Motion to Amend the Complaint and an Amended Complaint, which are reprinted in the Appendix at pages 65a and 46a. The district court's order denying Plaintiff's Motion to Amend Complaint is reprinted in the Appendix at page 45a. The Third Circuit granted the Motion for Leave to Amend Complaint with respect to the Title IX claim.[1] (App. 24a).

STATEMENT OF JURISDICTION

The judgment and opinion of the Third Circuit were entered on March 16, 1998. (App. 1a). On April 20, 1998, the Third Circuit

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[1]Because the Amended Complaint more fully sets forth the allegations, supporting citations refer to the paragraphs in the Amended Complaint.

denied the Plaintiff's Petition for Rehearing and Rehearing *en Banc*. (App. 27a). The petition for certiorari is being filed within 90 days of that denial of rehearing.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The relevant portions of the Sherman Act, 15 U.S.C. §1, and the Clayton Act, 15 U.S.C. §15, which are fully set forth in the Appendix at pages 67a-68a, provide in pertinent part:

> **15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> **15 U.S.C. §15. Suits By Persons Injured; Amount of Recovery.**
>
> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees.

STATEMENT OF THE CASE

Renee M. Smith sued the National Collegiate Athletic

Association [hereinafter NCAA or Association] on August 27, 1996, asserting jurisdiction primarily under 28 U.S.C. §1337; (App. 48a). In the Amended Complaint, the essence of the suit is that the National Collegiate Athletic Association "conspir[ed] to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states." (App. 48a, at ¶12). The NCAA denied Petitioner's athletic eligibility during her enrollment in graduate programs at Hofstra University and the University of Pittsburgh during the 1994-1995 and 1995-1996 seasons respectively. (App. 49a, at ¶¶ 19-21).

This denial of eligibility emanated from neither preservation of amateurism nor sanctioning from rule infractions but resulted from academic achievement. Ms. Smith completed her undergraduate degree in two and one-half years and wished to pursue postgraduate degrees that were not offered at her undergraduate institution. (App. 44a-45a, at ¶¶ 2-5). Although she had two remaining years of athletic eligibility under the NCAA's Five-Year Rule, the Association denied her the right to participate in intercollegiate athletics at these graduate schools based solely on the Postbaccalaureate Bylaw. See 14.2.1 Five-Year Rule - Division I, (App. 71a); 14.1.8.2 Postbaccalaureate (App. 70a). (App. 49a, at ¶¶ 19-23). Accordingly, academic achievement was punished.

Under the five year rule, a student may be eligible to compete for four of five years. During this time, students may compete after transferring from an associate's degree program into a bachelor's program at a different school. See 14.6.4 Two-Year College Transfers; (App. 71a). Or a student may transfer between

schools during undergraduate tenure. See 14.6.5 Four-Year College Transfers; (App. 72a); 14.6.5.3.10 One-Time Transfer Exception; (App. 72a-73a). In these instances, an athlete may transfer for *any* reason. A student-athlete, however, may not be eligible to participate in intercollegiate athletics if she graduates from a bachelor's program and enters into a master's or doctorate program at a different school. See 14.1.8.2 Postbaccalaureate; (App. 70a). This bylaw prohibits student-athletes from participating in intercollegiate athletics at schools other that the student's undergraduate degree conferring institution. Presently, the NCAA has not offered any procompetitive justification for this bylaw.

Intercollegiate athletics generate millions of dollars and is substantially involved in interstate commerce. (App. 49a, at ¶¶ 15, 16; 52a, at ¶44). The student-athletes are an integral part of this transaction. (App. 49a, at ¶17). Moreover, the student-athletes generate revenue through their participation in intercollegiate sports, and the students are compensated for these services. (App. 51a-52a, at ¶¶ 36, 39, 40). Student-athletes train, compete, and travel in interstate commerce. (App. 52a). Decreasing the number of student-athletes reduces consumer choices.

In the decisions below, the courts held that the NCAA's exclusion of a student-athlete was not subject to antitrust scrutiny. 139 F.3d., at 186; 978 F. Supp., at 217-18; (App. 11a, 35a). First, the appellate court focused solely on the character of the NCAA's activities without considering Smith's alleged injuries. Id., at 185; (App. 8a). Next, the court determined that the Sherman Act's application is limited only to commercial and business endeavors.

Id., 185-86; (App. 11a). Finally, the court held eligibility rules and enforcement were not subject to antitrust laws because the Sherman Act has limited applicability to the organization, which has principally noncommercial objectives. Id., at 186; (App. 11a).

Petitioner's Amended Complaint specifically alleges that "[d]efendant's alleged unlawful activities are commercial in nature" (App. 53a, at ¶ 42) , and "[i]ntercollegiate athletics are activities in or substantially affecting interstate commerce." (App. 49a, at ¶15). Also in the Amended Complaint, Ms. Smith alleges that intercollegiate athletics is an activity in or affecting interstate commerce; student-athletes are an integral part of this commerce; the student-athletes generate revenue and are compensated for their services; and the restraint resulted in a decrease in competition and reduced competitive conditions. (App. 44a-54a). The lower courts, however, rejected these allegations apparently as impossible to prove under the standard for reviewing a pro se complaint under a motion to dismiss.

In the alternative, under the "rule of reason," the court assumed that the eligibility rules sought to ensure fair competition to prevent students from foregoing athletic participation. 139 F. Supp., at 187; (App. 14a). With a limited record, the court assumed without support that the bylaw at issue discouraged graduate schools from inducing students and/or undergraduate students at their own initiative from forgoing athletic participation during undergraduate school to save the eligibility for graduate school. Id.; (App. 14a). As mentioned, the NCAA has rules regulating the number of years in which the student-athlete may participate. See

14.2.1 Five Year Rule (App. 71a). Also, student-athletes cannot be contacted by another institution without the permission of the school's athletic director. See 14.6.5 Four-Year College Transfers; (App. 73a).

Further, the court made no mention of the less restrictive alternatives, such as those which are utilized to control associate degree and transfer students, to achieve any legitimate goals. The court held that the denial of eligibility, which restricted output by decreasing the number of competitors, prevented Plaintiff from obtaining scholarship awards, and reduced the quality of competition, was a reasonable, procompetitive restraint that ensured an "even playing field." Id.; (App. 14a).

This petition for certiorari seeks review of the Court of Appeals' decision granting the NCAA's Motion to Dismiss. This ruling excludes the NCAA's eligibility rules' promulgation and enforcement from the reach of antitrust laws. Further, in the absence of a substantive record, the court found that even if the bylaw were subject to the Sherman Act that the rule is procompetitive and reasonable.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS A CONFLICT IN PRINCIPAL WITH NATIONAL COLLEGIATE ATHLETIC ASS'N V. BOARD OF REGENTS OF THE UNIV. OF OKLAHOMA, 468 U.S. 85 (1984), EXPRESSLY CONFLICTS WITH HAIRSTON V. PACIFIC 10 CONFERENCE, 1996 WL 689631 (9TH CIR. (WASH.)), AND

PRESENTS THE IMPORTANT UNANSWERED QUESTION OF WHETHER NCAA ELIGIBILITY BYLAWS ARE SUBJECT TO ANTITRUST SCRUTINY.

The Third Circuit was unequivocal in stating that: "the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements." 139 F.3d at 186; (App. 11a). The court focused on "whether antitrust laws apply only to the alleged infringers commercial activities. Thus, rather than focus on Smith's alleged injuries, we focus on the character of the NCAA's activities." 139 F.3d, at 185; (App. 8a). Once determining that the promulgation and enforcement of eligibility rules were unrelated to the NCAA's commercial or business activities, the court stated that the Sherman Act "has only limited applicability to organizations which have principally noncommercial objectives." 139 F.3d, at 185-86; (App. 11a).

This case presents the significant question of whether the Sherman Act applies to NCAA bylaws regulating student-athletes. The importance of this issue is underscored by the ever increasing power of the Association, which can deny student-athlete eligibility thus, decreasing competitive conditions and eliminating the opportunity to obtain athletic scholarship or to train, compete, and travel as a team member. Also, the NCAA can sanction universities and eliminate the schools' ability to compete by instituting prohibitions on teams, e.g, a one year ban is known as the "death penalty." If NCAA rulings are not subject to judicial scrutiny under the antitrust laws, then the Association's power will continue to grow unmonitored to the possible detriment of participants and sports

fans.

a. The decision below incorrectly limits the applicability of the Sherman Act and presents an important unanswered question.

The reach of the Sherman Act is intended to be as broad as Congress' powers under the Commerce Clause. United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 555-60 (1944); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, n. 15 (1940). Congress may regulate the use of channels of interstate commerce, persons or things in interstate commerce, and activities having a substantial effect on interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

The primary purpose of the Sherman Act is to protect the market from a breakdown in competitive conditions and promote competition. In this regard, the United States Supreme Court was decisive: "consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with the role." National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 120 (1984) (emphasis in original). The Court elaborated:

> the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choices – not only the choices available to sports fans but also those available to athletes and hence can be viewed as procompetitive.

Id., at 102. In the supporting footnote, the Court approves the

Sherman Act's applicability to NCAA bylaws under a rule of reason analysis in Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 379-383 (D. Ariz. 1983). Id., at n.24.

In the relevant section of Justice, four members of the University of Arizona football team appealed sanctions, which rendered the team ineligible to participate in post-season competition in the 1983 and 1984 seasons or to make television appearances in the 1984 and 1985 seasons. 577 F. Supp., at 360. The NCAA concluded that the University's football team had violated numerous bylaws including accepting unauthorized "pay" for participation in that sport. Id., at 361-62.

Finding the Sherman Act applicable to the NCAA's denial of eligibility, the court analyzed the plaintiffs' contention that the University was prevented from reaching its consumers. Id., at 378–79. Whereas these sanctions were not "naked restraints" or "manifestly anticompetitive," the court reviewed the NCAA sanctions under the rule of reason noting that sports organizations do not have "unlimited discretion in adopting rules and regulations." Id., at 379-80. Thus, this specific pinpoint cite to Justice evidences the Supreme Court's validation of scrutinizing NCAA bylaws under antitrust laws.

In Board of Regents, the Court noted that there is "no doubt that the sweeping language of §1 applies to non-profit entities. 468 U.S., at 100 n.22. Additionally, the Court questioned the NCAA's non-profit character because the Association and its members are organized to maximize profit. Id. Although explaining:

[i]t is reasonable to assume that most of the regulatory

> controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of the participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture,

Board of Regents, 468 U.S., at 117, the Court has in no way exempted NCAA eligibility rules from antitrust scrutiny. Similarly, no other lower court has granted blanket immunity to NCAA eligibility rules.

b. The decision below presents an express conflict between the Ninth and Fifth Circuits and the Third Circuit.

In direct conflict with the lower court opinion, the Ninth Circuit found antitrust laws applicable to the student-athlete appeal of NCAA sanctions on the University of Washington football team for recruiting violations.[2] Hairston v. Pacific 10 Conference, 1996 WL 689631, *3 (9th Cir. (Wash.)). After the district court determined that the student-athletes had constitutional standing to maintain the suit under a three-part test (Hairston v. Pacific 10 Conference, 893 F. Supp. 1485 (W.D. Wash. 1994) (see *infra* pp. 23-24)), the Ninth Circuit applied the rule of reason test in which the fact finder

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[2]Similarly, in National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993), the Ninth Circuit found that "courts have consistently held that the NCAA . . . is engaged in interstate commerce in numerous ways.

determined if the restraint's harm outweighed the procompetitive effects. Hairston, 1996 WL 689631, at *3. Under the rule of reason, the plaintiff has the initial burden of showing that the restraint produces anticompetitive effects in the market; then the defendant must meet the burden of showing the restraint's procompetitive effects. Id. Finally, the burden shifts back to the plaintiff to show that any legitimate goals could have been achieved in a substantially less restrictive manner. Id.

Similarly, other district courts have applied the Sherman Act to determine whether the NCAA's denial of student-athlete's eligibility was reasonable. See Banks v. National Collegiate Athletic Ass'n, 746 F. Supp 850 (N.D. Ind. 1990); Justice, *supra*. In Banks, the NCAA denied the plaintiff's eligibility because he entered into the professional draft. In determining if the denial of eligibility violated the Act, the court found that the rule, which preserved the amateur nature of intercollegiate football, was reasonable because the procompetitive nature of the regulations outweighed the anticompetitive effect. Id., at 862. One factor the court noted was that "[n]othing in the record suggests that the NCAA officials are considering modification of the 'no agent' rule." Id., at 852.

In the instant case, however, the NCAA expressed its' interest in changing the Postbaccalaureate bylaw. (App. 91a-92a). In 1996, after Petitioner's eligibility expired, the bylaw was modified to grant a waiver to accommodate student-athletes who attend graduate school at a post graduate institution other than their undergraduate school. See 14.1.7 Graduate Student/ Postbaccalaureate Participation; (App. 87a). This rule was not

retroactive and did not affect Petitioner. Interestingly, this enactment of the new bylaw was mandated by the Association not approved by member vote, which is the usual procedure.

In the above cases, the courts applied the Sherman Act to determine the legitimacy of the restraint at issue under the rule of reason. In the instant case, the Third Circuit has refused to apply the Sherman Act to determine if any eligibility rule unreasonably restrains interstate trade or commerce because the denial of eligibility is "not commercial in nature." 139 F.3d., at 185-86; (App.10a-11a.) In clear contradiction with other federal courts, the Third Circuit's total exemption must be incorrect. Even the minority of courts, which have created a narrow exemption from Sherman Act scrutiny, have done so on the limited basis of preserving amateurism.

For example, in Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990), the student-athlete challenged the denial of his eligibility after he unsuccessfully entered into the football draft. The "no draft" rule provides that a student-athlete loses his eligibility upon entering into a professional draft. Id., at 740. The court, however, did not analyze the exclusion under the antitrust laws and explained: "by holding that the eligibility Rules challenged by Gaines are not subject to antitrust analysis, this Court is by no means creating a total exemption, but rather a very narrow one." 746 F. Supp., at 744. Again, this decision is premised on preserving amateurism. Id., at 743.

When a similar rule, which forbade contacting a sports agent or securing advice from a lawyer regarding a professional sports

contract, was challenged, the court looked to the Sherman Act. College Athletic Placement Srvc. v. Nat'l Collegiate Athletic Ass'n, 1974 WL 988, *3 (D. N.J.). Here, the court found that no anti-competitive intent existed. Id., at *4. Thus, the court refused to apply the Act because the rules promoted amateurism in college sports and related to educational standards. Id., at *3.

Next, the Fifth Circuit was unable to determine whether the student–athletes had standing to sue for damages under the tests set forth in Associated General Contractors of Cal. v. Cal. State Counsel of Carpenters, 459 U.S. 519 (1983). McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988). The court did not resolve the issue of whether the student-athletes were "proper plaintiffs" because the players were able to transfer institutions and not completely disqualified from college football and stated:

> [h]ad the players alleged that they had been completely disqualified from playing college football or that they declined or at least would have received more lucrative scholarship offers from other schools because of the eligibility restrictions, they would present a more compelling claim to be "proper plaintiffs" under Associated General Contractors.

Id., at 1343. Nevertheless, the court resolved the case without deciding the standing issue. Applying the Sherman Act's rule of reason, the court found that the sanctions were not an unreasonable restraint of trade because the plaintiff failed to allege any contrary factors. Id., at 1343.

Unlike McCormack, the Petitioner was independently and

explicitly denied eligibility. Also, Ms. Smith alleges that if any legitimate goals exist, they could be achieved in a substantially less restrictive manner similar to two-year or four-year college transfer students' rules set forth in Appendix 72a-77a. (App. 50a, at ¶26).

Presently, the only authority that supports the current decision is another Third Circuit ruling. Based on that record, that court concluded that the Sherman Act did not reach the action of the NCAA in setting eligibility standards for intercollegiate athletics.[3] Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (3d Cir. 1975). Jones was denied eligibility once he received impermissible compensation for playing hockey in violation of a rule maintaining amateurism. Id., at 301. Because the plaintiff did not show that the setting of eligibility guidelines had a nexus to the commercial or business activities of the defendant, the court found that the Sherman Act did not reach NCAA eligibility standards. Id., at 303.

In all of the cases regarding student-athlete eligibility, the decisions ultimately hinged on whether the bylaw preserved the amateur nature and, thus, the unique product of the sport. In the instant case, however, maintaining the demarcation between amateur and professional athletics is not an issue. Rather, Petitioner was in good standing and would have been eligible but for the NCAA's refusal to waive the Postbaccalaureate bylaw.

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[3]In Board of Regents, 104 U.S., at 103 n.24, the Court also pinpoint cited to this decision. On the relevant page, the court discusses that amateurism is at the heart of the Association. Jones, 392 F.Supp., at 304. But the Court does not adopt the Third Circuit's analysis described here.

Surely, the Supreme Court did not have the Postbaccalaureate bylaw in mind when assuming that most of the NCAA regulatory controls are procompetitive. See 408 U.S., at 117. The bylaw at issue does not "enhance public interest in intercollegiate athletics" or preserve a "unique product which might not otherwise be available." Id. Likely, the Court envisioned requiring minimum grade point averages, SAT scores, or full-time attendance but not setting a maximum education level. Thus, the exclusion of Petitioner from competition in intercollegiate athletics must fall within the reach of the Sherman Act.

II. THE DECISION BELOW CONFLICTS WITH GOLDFARB V. VIRGINIA STATE BAR, 421 U.S. 773 (1979), SUMMIT HEALTH, LTD. V. PINHAS, 500 U.S. 322 (1991), AND ASSOCIATED GEN. CONTRACTORS V. CALIFORNIA STATE COUNCIL OF CARPENTERS, 459 U.S. 519 (1983) BECAUSE THE LOWER COURT FAILED TO UTILIZE ANY OF THE JURISDICTIONAL OR STANDING TESTS.

In deciding whether Petitioner has set forth facts which state a claim as a matter of law, the Court must accept all factual averments in the complaint as true and grant the Petitioner all favorable inferences that can be drawn from those allegations. Conley v. Gibson, 355 U.S. 41, 48 (1957). Moreover, the Court should construe *pro se* complaints more liberally than those drafted by attorneys and grant dismissal only if it appears beyond a doubt that the plaintiff can prove no set of facts to support her claim that would entitle her to relief. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Generally, it is well accepted that antitrust cases are particularly inappropriate for dismissal in the absence of opportunity

for discovery. Hospital Building Co. v. Trustee of Rex Hospital, 425 U.S. 738, 746 (1976).

a. The Sherman Act applies to the denial of a student-athlete's eligibility to participate in intercollegiate athletics because the student-athlete is an integral part of interstate transactions.

When services are an integral part of a larger activity that substantially affects commerce, a restraint on these services is analyzed under the Sherman Act. Goldfarb v. Virginia State Bar, 421 U.S. 773, 784-85 (1975). In Goldfarb, the Fairfax county bar, a voluntary organization, created a recommended minimum price list for common legal services. Unable to find an attorney who would charge a fee lower than the minimum fee schedule for examining land title in connection with financing real estate purchases, plaintiffs brought a class action suit alleging a Sherman Act violation. Id., at 778. The county bar association argued that the minimum fee schedule should be exempt from the antitrust laws because the practice of law is not "trade or commerce." Id., at 779. In the alternative, the bar association contended that the title examination fees at issue had an "incidental" effect on commerce, which did not justify federal regulation. Id., at 780.

In analyzing whether the Sherman Act applied to these legal services, the Supreme Court inquired into whether the activities were in interstate commerce or affected interstate commerce. Id., at 780, 784. First, a significant portion of the funds for purchasing the property came from out of state so that the transactions were frequently interstate. Id., at 783-784. Second, the legal services

were a necessary element of obtaining financing for the purchase, such that the conduct "is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." Id., at 784 (quoting United States v. Frankfort Distilleries, 324 U.S. 293, 297 (1945)). Because the services were a part of a larger activity, which affects interstate commerce between the states, the Court held that interstate commerce was sufficiently affected to invoke antitrust scrutiny. Id., at 783-84.

Similarly, the services of student-athletes are an indispensable part of intercollegiate athletics, a multi-million dollar industry. Without the athletes, there would be no college football, national championships, or other college sports. Many of these competitions are interstate transactions because competing institutions, student-athletes, and sports fans travel interstate and utilize the instrumentalities in interstate commerce. A portion of the funds furnished for and generated by intercollegiate athletics come from outside of the state. When taken as a whole, intercollegiate athletics has a very substantial impact on interstate commerce. Similarly, the Universities accept out-of-state funding and enroll out-of-state students. Because student-athlete services are a necessary element of intercollegiate athletics, interstate commerce must be found to be sufficiently affected. Thus, the Respondents' alleged infringing activities fall within the ambit of antitrust scrutiny.

In a second issue in Goldfarb, the Court determined whether the legal profession is excluded from antitrust regulation because it is not "trade or commerce." Id., at 787. The language of

section 1 of the Sherman Act contains no exceptions, and there is a heavy presumption against implicit presumptions. Id. (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); California v. FPC, 369 U.S. 482, 485 (1962). Further, the cases include the sale of services within the scope of section 1. See Radovich v. Nat'l Football League, 352 U.S. 445 (1957). "[T]he examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word." 421 U.S., at 787-88. Thus, the Court found that the services of lawyers are subject to antitrust scrutiny because activities may restrain commerce. Id., at 788.

Similarly, the Respondents' activities must fall within the reach of the Sherman Act because this restraint affects commerce by eliminating competitors who travel interstate, reducing the quality of competition, decreasing educational options, and lessening consumer choices. First, the comprehensive language of the Act covers the Respondent's denial of athletic eligibility to student-athletes because no antitrust exemption exists for the NCAA bylaws, and student-athletes provide services in exchange for valuable compensation. Second, the student-athlete provides services of being a participant in athletic competitions. In exchange for the services, the student-athletes are compensated with thousands of dollars in scholarships for tuition and living expenses, coaching, training, travel, lodging, clothing. (App. 51a, at ¶¶ 33,34). Although not a per se exchange for money, this compensation has a valuable monetary equivalent. Also, athletic participation is intended to be a substitute for money because the NCAA places

limitations on employment for student-athletes.

In United States v. Brown University, 5 F.3d 658, 666 (3d Cir. 1993), the court found that "the payment of tuition in return for educational services constitutes commerce." Accordingly, because providing financial aid constitutes a component of the tuition setting process, it is commerce. Id. Thus, any attempts to conspire to set financial aid packages violated the Sherman Act, regardless of whether the institutions had an altruistic motive. Similarly, the NCAA's denial of eligibility precludes Petitioner's receipt of athletically related financial aid, and, the tuition cost is artificially increased. This is precisely the type on anticompetitive results that the Sherman Act was designed to prevent.

In Brown, the policies and actions by the members of the Ivy Overlap Group were far more educationally and academically based than the actions by the NCAA and its member institutions in promulgating and enforcing the Postbaccalaureate bylaw. Collective actions by undergraduate institutions, which benefit those institutions and have anticompetitive effects, such as reduction of output, deterioration in quality of goods or services, or elimination of competition for scholarship aid, are subject to antitrust review, and the applicable standard is the rule of reason.[4] Id., at 666-668,

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[4]In addition to restricting competition for student-athletes and preventing students from participating in intercollegiate athletics, the Postbaccalaureate bylaw also restricts competition for financial aid. Student-athletes who lose their eligibility by attending a different academic institution for graduate study cannot compete for athletic financial assistance, which, in turn, may adversely affect their opportunity for graduate education.

673-74.

With respect to the Postbaccalaureate rule in this case, the NCAA and its member institutions shield themselves from competition with academic institutions with graduate programs, or from schools with graduate programs different or better that their own. Moreover, the creation and existence of bylaws, including the Postbaccalaureate bylaw, are linked to the economic benefits which the member institutions obtain from intercollegiate sports. Accordingly, it cannot be assumed that NCAA eligibility rules do not affect commerce.

b. The interstate commerce requirement of antitrust jurisdiction is satisfied by the allegations that Respondents conspired to exclude Petitioner from the market of intercollegiate athletics.

The jurisdictional element of a Sherman Act violation can be established by demonstrating a substantial effect on interstate commerce resulting from the alleged violator's overall activity. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 331 (1991). In Summit, the Court analyzed whether the plaintiff's allegations satisfied the interstate commerce requirement of antitrust jurisdiction. First, the petitioner, a parent hospital, was unquestionably engaged in commerce. Id., at 329. Second, it was clear to the Court that the individual doctor's services were regularly performed for out-of-state patients and generated revenue from out-of-state sources. Id.

Although the respondent doctor did not allege or prove an

actual effect on interstate commerce, the jurisdictional requirements were met because a successful conspiracy would reduce the provision of medical services in the market "'as a matter of practical economies.'" Id., at 331 (citing McClain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246 (1980) (quoting Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 745 (1976))). Where the plaintiff's complaint identified only himself as a victim of the alleged restraint, the same analysis applies because Sherman Act violations are "necessarily more significant than the fate of 'just one merchant whose business is so small that his destruction makes little difference to the economy.'" Id., at 332 (citing Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959)). See also Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (holding that the production and consumption of homegrown wheat when viewed in the aggregate substantially affects commerce).

In the case at bar, Petitioner has alleged an actual reduction in services and anticompetitive effect, which necessarily decreased the volume of consumption. (App. 49a, at ¶¶28,29). Similar to Summit Health, the NCAA, Hofstra University, and the University of Pittsburgh are unquestionably engaged in interstate commerce. Moreover, the Respondents' activities have a substantial effect on interstate commerce. Petitioner regularly competed at out-of-state venues and against out-of-state competitors. Further, Petitioner's services as a student-athlete generated revenue from out-of-state sports fans and from participation in conference championships. Even though other student-athletes have been denied eligibility of the same basis, Petitioner's Amended Complaint names herself, the

teams, and consumers as victims of the alleged restraint. Thus, antitrust analysis applies.

c. The antitrust laws are not limited to "commercial interests," and the NCAA's denial of Petitioner's athletic eligibility resulted in a direct antitrust injury.

To state a claim under the Sherman Act, "allegations adequate to show a violation and, in a private treble damage action, the plaintiff was damaged are all the law requires." Blue Shield of Virginia v. McCready, 457 U.S. 465, 473 n. 9 (1982) (quoting Radiant Burners, Inc. v. Peoples Gas Company, 364 U.S. 656, 659-60 (1961)). "These [antitrust] laws protect the victims of forbidden practices as well as the public." Radovich v. National Football League, 352 U.S. 445, 454 (1957). The Supreme Court mandated that requirements should not be added to the statutory language of the Sherman Act "to burden the private litigant beyond what is specifically set forth by Congress in those laws." Id.

In the instant case, the lower courts added the requirement that Respondents' specific action of denying eligibility must be "related to its commercial or business activities" or provide the Association with a "commercial advantage." 139 F.3d, at 186; 978 F. Supp., at 217-18; (App.7a-11a; App. 37a). Although the lower courts apparently based their decisions on the Sherman Act, the district court specifically limited Sherman Act application to "commercial interests," a limitation which this Court addresses under the Clayton Act, 15 U.S.C. §15. Because the Third Circuit utilized the district court's line of reasoning, Petitioner next addresses

Clayton Act standing under the broad definition of the class of persons who may maintain a private damages action under the antitrust laws.

In the Clayton Act, the use of the disjunctive "or" in the phrase "business or property," demonstrates that Congress did not intend "business" to modify "property" or "property" to modify "business." Reiter v. Sonotone, 442 U.S. 330, 338-339 (1979). The lack of restrictive language led the Supreme Court to reject the notion that Congress intended this remedy to be available to redress only "commercial interests." Id., at 338; McCready, 457 U.S., at 473. Monetary injury satisfies the "property" injury requirement. Reiter, 412 U.S., at 340.

In determining if the Petitioner is a proper party to bring suit, the Supreme Court has listed five factors to consider: (1) the nature of the plaintiff's injury; (2) the directness of the injury; (3) the intent of the conspirators; (4) the character of the damages; and (5) the existence of other, more appropriate plaintiffs. Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 537-45 (1983). In determining standing, the directness of the injury is the focal element of the analysis. 459 U.S., at 540 See also Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 269 (1992).

In Hairston v. Pacific-10 Conference, 893 F.Supp. 1485 (W.D. Wash. 1994) [hereinafter Hairston I], the student-athletes survived dismissal because they alleged a direct antitrust injury when their athletic conference, the Pacific-10, and the NCAA penalized the University of Washington for rule infractions. In this

sanctioning, not only the school but also the players were banned from bowl appearances. Therefore, the court reasoned that the alleged antitrust injury, the loss of the players' right to compete in bowl games, satisfied the test set forth in McCready because the harm was integrally related to as well as a likely result of the restraint. Id., at 1491. The court explained that the players alleged a specific intent because they claimed a direct harm, and that the existence of other possible plaintiffs does not preclude standing. Id., at 1491-92. Thus, the court held that the players had antitrust standing. Id.

Similarly, the NCAA's determination to deny Petitioner's athletic eligibility resulted in the loss of her right to compete in intercollegiate athletics. In comparison to Hairston I, this injury is an even more direct result of the restraint because the NCAA explicitly, independently denied Petitioner's athletic eligibility. Moreover, Ms. Smith was injured by being barred not only from post-season tournaments such as bowl games but also from the entire season of competition and training. Thus, this Court must find that the Petitioner has standing to sue because she suffered a more direct and severe antitrust injury than the plaintiffs' injuries in Hairston I.

Additionally, the Supreme Court stated that "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.' " McCready, 457 U.S., at 479 (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 125 (1969)). When the harm to a class is clearly foreseeable and a necessary step in reaching the

ends of an illegal conspiracy, the alleged injury is integral. Id. Further, the plaintiff is injured if she is "within that area of the economy . . . endangered by [that] breakdown of competitive conditions." Id., 457 U.S., at 480-481 (quoting In re Multidistrict Vehicle Air Pollution M.L.D. No. 31, 481 F.2d 122, 129 (9th Cir. 1973)).

Similar to McCready, to reach the ends of eliminating graduate students from participation in intercollegiate athletics at an institution other that the undergraduate institution, the NCAA must foresee the type of injury that the restraint would cause. The NCAA is aware that not all graduate programs are offered at every institution. When a student-athlete graduates with eligibility remaining, such an athlete would necessarily be harmed if he entered into another institution to pursue his educational objectives. Also, smaller institutions that have few if any graduate programs are injured by being placed at a competitive disadvantage to larger universities.

Such a breakdown in competitive conditions endangers student-athletes, individual teams, and intercollegiate athletics. Specifically, Petitioner's preclusion from intercollegiate athletics injures: (1) Petitioner as an athlete by eliminating her from training and competing; (2) the teams and the sports in which she would have participated by decreasing the number of players and the depth of skills; and (3) the volume of commerce and consumer choices within those markets. Accordingly, Petitioner's injury falls within the ambit of antitrust laws because it too flows directly from that which makes the NCAA's action unlawful. Thus, Ms. Smith is

a proper party to bring suit because she suffered a direct antitrust injury.

Although this decision addressed the remoteness of a consumer's right to recover under the Clayton Act, this Court should not read the decision to apply only so narrowly because the Clayton Act "does not confine its terms to consumers, or to purchasers, or to competitors or to sellers . . .. The Act is comprehensive in its terms and coverage protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." McCready, 457 U.S., at 472, (citing Mandevile Island Farms, Inc. v. American Crystal Sugar, Co., 334 U.S. 219, 236 (1948)). In accordance with the logic in McCready, courts have permitted suits by plaintiffs who are not traditional competitors or consumers, so long as a direct injury is alleged. See, e.g., Radovich.

In McCready and its progeny, the issues addressed by the Court deal with Congress' primary concerns in prohibiting antitrust violations to protect victims of forbidden practices. Thus, many of the policies that guided the Court in reaching its holding are equally applicable here because the analysis focuses on the prevention of unreasonable restraints of trade, promotion of competition, and the protection of the market from a breakdown in competitive conditions.

III. SUBJECTING THE NCAA BYLAWS TO ANTITRUST SCRUTINY PROMOTES THE POLICY OF PROTECTING THE INSTITUTION OF AMATEUR ATHLETICS AND WIDENING CONSUMER CHOICES FOR STUDENT-ATHLETES AND CONSUMERS, AND THIS PROTECTION WILL NOT OPEN THE FLOODGATES TO LITIGATION.

A favorable decision for Petitioner will provide that the judiciary, as an independent, neutral regulatory authority, can protect student-athletes from unreasonable eligibility denials or review grossly disproportionate sanctions. Regulating NCAA rules under the rule of reason will not open the floodgates for litigation because many of the bylaws protect the product of college athletics.

The existing Third Circuit opinion sets a very negative and incorrect precedent for future student-athlete challenges. Most student-athletes do not have affordable access to legal advice or the financial means to challenge the NCAA, an organization that possesses tremendous control and power. Apparently, coaches, student-athletes, and universities are apprehensive to challenge this authority for fear of sanctions. In the past, appeals have been from players who had potential to play professional sports or were from the highest revenue producing sports. For all of the other student-athletes who could unreasonably be denied eligibility to participate in the "once in a lifetime" intercollegiate athletics experience, Petitioner respectfully requests the Court to grant this petition.

In the instant case, the NCAA has eliminated a competitor and decreased competition. If Ms. Smith had not completed her bachelor's degree in two and one-half years, she would not have been denied eligibility. She could have transferred institutions while maintaining undergraduate status or after completing an associate's degree and retained eligibility. Ms. Smith's achieving status as a graduate student in this time frame should not be punished.

Petitioner is not submitting that eligibility be granted to all

students for an indefinite period of time. In any of the above hypotheticals, Ms. Smith would have been limited to athletic participation for four of the five years. See 14.2 Seasons of Competition thru 14.6.6 "4-2-4" College Transfers (App. 771a-77a). During this five-year period, Ms. Smith's entering graduate programs, which were unavailable at her undergraduate school, does not warrant exclusion from athletics. Further, academic achievement should not bar her continued participation in intercollegiate athletics because the program "shall be conducted in a manner designed to protect and enhance the . . . educational welfare of the student-athlete." See, 2.2 The Principal of Student-Athlete Welfare; (App. 69a). See also, 1.3.1 Basic Purpose, 1.3.2 Obligations of Member Institutions, 2.4 The Principle of Sound Academic Standards (App. 69a-70a).

If the NCAA does have any legitimate goals to achieve in the enforcement of the Postbaccalaureate Bylaw (such as preventing recruiting of the student-athletes), the objectives could have been achieved in a substantially less restrictive manner than completely denying the Petitioner's athletic eligibility. For example, the rules regulating two-year or four-year transfers students could have been utilized as the bylaw does now provide. 14.1.7.1 One-Time Transfer Exception (App. 84a). Under the rule of reason, the determination whether the rule is unreasonable is reserved for the fact finder.

CONCLUSION

No lower court, other than the Third Circuit, has granted complete Antitrust immunity to NCAA eligibility rules. Although rules promoting amateurism have been found reasonable or given a narrow exemptions, the bylaw at issue does not pursue this goal. The NCAA's regulation of intercollegiate athletics substantially affects interstate commerce, and the student-athlete is an integral aspect of this activity. Also, Petitioner's Amended Complaint alleges the requisite Sherman Act jurisdictional elements. As a "proper plaintiff," Petitioner must survive Respondent's motion to dismiss for failure to state a claim because the lower court improperly excluded the NCAA eligibility bylaws from the reach of the Sherman Act. Thus, Petitioner respectfully requests the Court to grant this petition.

Respectfully submitted,

Renee M. Smith
Pro Se Petitioner
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 97-3346 and 97-3347

R. M. SMITH,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Renee M. Smith,
Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civ. No. 96-01604)

Argued February 12, 1998

BEFORE: GREENBERG, NYGAARD and MCKEE, Circuit Judges.

(Filed: March 16, 1998)

Renee M. Smith (argued)
5426 Fifth Avenue
Shadyside Inn
Pittsburgh, PA 15232

Pro Se

Larry A. Silverman
Christine A. Ward
Dickie, McCamey & Chilocote
Two PPG Place
Suite 400
Pittsburgh, PA 15222-5402

John J. Kitchin (argued)
Robert W. McKinley
Swanson, Midgeley, Gagwere,
Kitchin & McLarney
922 Walnut

Suite 1500
Kansas City, MO 64106

Attorneys for Appellee

Marcia D. Greenberger
Deborah L. Blake (argued)
National Women's Law Center
11 DuPont Circle, N.W.
Suite 800
Washington, D.C. 20036

Attorneys for Amici Curiae National Women's Law Center, American Association for Active Lifestyles & Fitness, American Association of University Women, AAUW Legal Advocacy Fund, American Civil Liberties Union, Center for Women Policy Studies, The Connecticut Women's Legal Fund, Equal Rights Advocates, Inc., National Association for Girls and Women In Sport, National Coalition for Sex Equity in Education, National Education Association, NOW Legal Defense and Education Fund, Trial Lawyers for Public Justice, Wider Opportunities for Women, Women Employed, Women's Law Project, Women's Legal Defense Fund, Women's Sports Foundation, and The Young The YWCA of the USA

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Renee M. Smith, a pro se litigant, appeals from the district court's order of May 21, 1997, dismissing her complaint for failure to state a claim, and from the district court's order of June 5, 1997, denying her motion for leave to amend her complaint. Smith's complaint alleges violations of section 1 of the Sherman Act, 15 U.S.C. S 1, and Title IX of the Educational Amendments of 1972, 20

U.S.C. S 1681, as well as a state law breach of contract claim against the National Collegiate Athletic Association ("NCAA"). Smith's allegations arise from the NCAA's promulgation and enforcement of a bylaw prohibiting a student-athlete from participating in intercollegiate athletics while enrolled in a graduate program at an institution other than the student-athlete's undergraduate institution.

The district court had jurisdiction over the federal claims in this matter pursuant to 28 U.S.C. SS 1331 and 1337 and 15 U.S.C. S 15, and over the state law claim pursuant to 28 U.S.C. S 1367. This court has jurisdiction to review the final orders of the district court pursuant to 28 U.S.C. S 1291.[1]

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[1]According to the NCAA rules, a student-athlete is eligible to participate in intercollegiate athletics for a total of four seasons within a five-year period. Because Smith's five year-period of eligibility has expired and, according to the NCAA her complaint seeks only declaratory relief, the NCAA concludes that her Title IX claim is moot. We disagree.

Smith's Title IX claim is not moot although her period of eligibility has expired because she retains a claim for damages. See Ellis Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 442, 104 S.Ct. 1883, 1889 (1984) (holding that a claim is not moot where there is a viable damages claim); National Iranian Oil Co. v. MAPCO Int'l, Inc., 983 F.2d 485, 489 (3d Cir. 1992); Jersey Cent. Power & Light Co. v. New Jersey, 772 F.2d 35, 41 (3d Cir. 1985). Although count II of Smith's complaint, which asserts a Title IX claim, states that "[t]his action is a request for a declaratory relief challenging sex discriminatory practices and policies of the NCAA . . . in violation of Title IX," her complaint also includes a clause which prays for additional relief including damages and any further relief which the court finds appropriate. App. at 5. In our view, a fair reading of the complaint establishes that it asserts an action for damages under Title IX. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60,

We exercise plenary review over the district court's dismissal of Smith's complaint for failure to state a claim. See Lake v. Arnold, 112 F.3d 682, 684 (3d Cir. 1997). We accept all of her allegations as true, view them in the light most favorable to her, and will affirm the dismissal only if she can prove no set of facts entitling her to relief. See Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996); ALA, Inc. v. CCAir, Inc., 29 F.3d 855, 859 (3d Cir. 1994). We review the district court's denial of her motion for leave to amend her complaint for abuse of discretion. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997).

II. FACTS AND PROCEDURAL HISTORY

Smith graduated from high school in the spring of 1991 and enrolled in St. Bonaventure University the following fall, where she participated in Division I athletics. Smith played intercollegiate volleyball for St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. By her choice, Smith did not participate in intercollegiate volleyball for St. Bonaventure during the 1993-94 season.

Smith graduated from St. Bonaventure in two and one half years. Thereafter, she enrolled in a postbaccalaureate program at Hofstra, and then in 1995 she enrolled in a second postbaccalaureate program at the University of Pittsburgh. St. Bonaventure did not offer either of these postbaccalaureate

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112 S.Ct. 1028 (1992) (holding that a claim for damages exists in an action to enforce Title IX).

programs.

The NCAA is an unincorporated association comprised of public and private colleges and universities and is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards. The member institutions agree to abide by and enforce these rules. The NCAA denied Smith eligibility to compete for Hofstra and the University of Pittsburgh in the 1994-95 and 1995-96 athletic seasons, respectively, based upon Bylaw 14.1.8.2 in the NCAA Manual (the "Postbaccalaureate Bylaw"). The Postbaccalaureate Bylaw provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree.[2] Both Hofstra and the University of Pittsburgh applied to the NCAA for a waiver of the bylaw with respect to Smith, but the NCAA denied both requests. Smith was,

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[2]The bylaw at issue provides that

> [a] student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period . . . . Rule 14.1.8.2 of NCAA Manual.

however, in good academic standing and in compliance with all other NCAA eligibility requirements for the 1994-95 and 1995-96 athletic seasons.

In August 1996, Smith instituted this suit challenging the NCAA's enforcement of the bylaw as well as the NCAA's refusal to waive the bylaw in her case. More particularly, Smith alleged that the Postbaccalaureate Bylaw is an unreasonable restraint of trade in violation of section 1 of the Sherman Act and the NCAA's refusal to waive the bylaw excluded her from intercollegiate competition based upon her sex in violation of Title IX. Smith also asserted a state law breach of contract claim based upon the NCAA's denial of eligibility. On May 21, 1997, the district court dismissed Smith's federal claims for failure to state a claim upon which relief could be granted. The court held that the NCAA's refusal to waive the bylaw was not the type of action to which the Sherman Act applied. It also held that Smith's complaint did not allege adequately that the NCAA was a recipient of federal funding so as to be subject to Title IX. By the same order, the district court exercised its discretion to dismiss Smith's state law contract claim pursuant to 28 U.S.C. S 1367(c). See Smith v. National Collegiate Athletic Ass'n, 978 F. Supp. 213 (W.D. Pa. 1997).

Thereafter, Smith submitted a proposed amended complaint and moved the district court for leave to amend her complaint, which the district court denied "as moot" on June 5, 1997. Smith filed timely appeals from these orders, which we have consolidated.

III. DISCUSSION

A. SHERMAN ACT CLAIM

Count I of Smith's complaint alleges that the NCAA, in promulgating and enforcing the Postbaccalaureate Bylaw, violated section 1 of the Sherman Act because the bylaw unreasonably restrains trade and has an adverse anticompetitive effect. As we have indicated, the district court dismissed this claim for failure to state a claim upon which relief could be granted, holding that "the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Petitioner to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied." See Smith, 978 F. Supp. at 218. Smith argues that the district court erred in limiting the application of the Sherman Act to the NCAA's commercial and business activities. We disagree.

Section 1 of the Sherman Act provides, in relevant part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. S 1. Although the section literally prohibits "every" contract, section 1 does not preclude all restraints on trade, but only those that are unreasonable. See National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98 & n.17, 104 S.Ct. 2948, 2959 & n.17 (1984); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-44, 102 S.Ct. 2466, 2472-73 (1982). The Clayton Act, 15 U.S.C. SS 15, 26, grants a private right of action to, inter alia, a person "injured in his business or property" by a violation of

section 1 of the Sherman Act.[3]

Smith misconstrues the law in arguing that the Supreme Court has refused to limit antitrust remedies to commercial interests. The cases she cites address whether the plaintiffs alleged injuries within the meaning of the Clayton Act; in that context, the Court held that the statute was not limited to redressing injuries to commercial interests. See Reiter v. Sonotone Corp., 442 U.S. 330, 338-89, 99 S.Ct. 2326, 2330 (1979) (holding that "injury to business or property" was not limited to commercial interests); Blue Shield of Va. v. McCready, 457 U.S. 465, 473, 102 S.Ct. 2540, 2545 (1982) (holding that a subscriber to a health plan who had employed the services of a psychologist alleged a redressable antitrust injury); see also McNulty v. Borden, Inc., 474 F. Supp. 1111, 1115-18 (E.D. Pa. 1979) (holding that an employee of an alleged antitrust violator was injured in his business or property). The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities. Thus, rather than focus on Smith's alleged injuries, we consider the character of the NCAA's activities.

In this regard, we recognize that the Supreme Court has suggested that antitrust laws are limited in their application to

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[3]3. Section 4 of the Clayton Act provides:

[A]ny person who shall be injured in his business or property byreason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to theamount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonableattorney's fee.
15 U.S.C. S 15.

commercial and business endeavors. Thus, the Court has explained that

> [the Sherman Act] was enacted in the era of `trusts' and of `combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93, 60 S.Ct. 982, 992 (1940). The Court also has noted that "in Apex [it] recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S.Ct. 705, 710 n.7 (1959).

The Supreme Court addressed the applicability of the Sherman Act to the NCAA in National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948, holding that the NCAA's plan to restrict television coverage of intercollegiate football games violated section 1. The Court discussed the procompetitive nature of the NCAA's activities such as establishing eligibility requirements as opposed to the anticompetitive nature of the television plan. See id. at 117, 104 S.Ct. at 2969. Yet, while the Court distinguished the NCAA's television plan from its rule making,

it did not comment directly on whether the Sherman Act would apply to the latter.

Although insofar as we are aware no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules, cf. McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988) (assuming without deciding that the NCAA's eligibility rules were subject to antitrust scrutiny and holding that the "no-draft" and "no-agent" rules do not have an anticompetitive effect), many district courts have held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements. See Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738, 744-46 (M.D. Tenn. 1990) (holding that antitrust law cannot be used to invalidate NCAA eligibility rules, but noting in dicta that the"no-agent" and "no-draft" rules have primarily procompetitive effects); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that antitrust law does not apply to NCAA eligibility rules); College Athletic Placement Servs., Inc. v. National Collegiate Athletic Ass'n, 1975-1 Trade Cas. (CCH) P 60,117, available in 1974 WL 998, *2, *3 (D.N.J. 1974) (holding that the NCAA's adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of antitrust law), aff'd , 506 F.2d 1050 (3d Cir. 1974) (table).

We agree with these courts that the eligibility rules are not related to the NCAA's commercial or business activities. Rather than intending to provide the NCAA with a commercial advantage, the

eligibility rules primarily seek to ensure fair competition in intercollegiate athletics. Based upon the Supreme Court's recognition that the Sherman Act primarily was intended to prevent unreasonable restraints in "business and commercial transactions," Apex, 310 U.S. at 493, 60 S.Ct. at 992, and therefore has only limited applicability to organizations which have principally noncommercial objectives, see Klor's, Inc., 359 U.S. at 214 n.7, 79 S.Ct. at 710 n.7, we find that the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements.[4]

Moreover, even if the NCAA's actions in establishing eligibility requirements were subject to the Sherman Act, we would affirm the district court's dismissal of this claim. The NCAA's eligibility requirements are not "plainly anticompetitive," National

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[4]The recent decision of the Court of Appeals for the Tenth Circuit in Law v. National Collegiate Athletic Ass'n, No. 96-3034, 1998 WL 23710 (10th Cir. Jan. 23, 1998), does not alter our result. At issue in Law was the NCAA's bylaw restricting entry-level coaches' annual compensation. The court held that although the restriction was a horizontal price restraint, which is usually per se invalid, the rule of reason applied because certain products, such as intercollegiate sports, require horizontal restraints in order to exist. See id. at *5-*6 (citing National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 100-01, 104 S.Ct. at 2959-60).

The bylaw at issue in Law concerned a restriction on the business activities of the institutions, whereas the Postbaccalaureate Bylaw does not. Because our analysis regarding the applicability of the Sherman Act focuses on the distinction between commercial and noncommercial activities, Law is inapposite. Further, because of the significant difference in the nature of the bylaw at issue in Law and the Postbaccalaureate Bylaw, the Law court's rule of reason analysis is not instructive here.

Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365 (1978), and therefore are not per se unreasonable, see National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 101, 104 S.Ct. at 2960 (refusing to apply per se rule to NCAA's television plan because the NCAA is involved in an industry where horizontal restraints are necessary to the availability of the product); McCormack, 845 F.2d at 1343- 44; College Athletic Placement Servs., 1975-1 Trade Cas. (CCH) P 60,117, available in 1974 WL 998, *3. Consequently, if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason.

Under the "rule of reason" test, a court considers all relevant factors in determining a defendant's purpose in implementing the challenged restraint and the effect of the restraint on competition, see Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367-68 (3d Cir. 1996) (citing Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 243-44 (1918)), and asks essentially whether the challenged rule promotes or hinders competition. See McCormack, 845 F.2d at 1344.

As noted above, the Supreme Court has recognized the procompetitive nature of many of the NCAA's restraints, including eligibility requirements. See National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. at 117, 104 S.Ct. at 2969. According to the Supreme Court,

> [w]hat the NCAA and its member institutions market in this case is competition itself--contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules . . . must be agreed upon, and all restrain the

> manner in which institutions compete. . . . Thus, the NCAA plays a vital role in enabling [intercollegiate sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice . . . and hence can be viewed as procompetitive.

Id. at 101-02, 104 S.Ct. at 2960-61 (footnote omitted). In particular, the Court explained that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics" and suggested that rules establishing eligibility requirements of student-athletes were such controls, while rules limiting television broadcasts were not. See id. at 117, 104 S.Ct. at 2969.

While the parties have not cited any opinion addressing the particular bylaw at issue here, and we have found none, other courts have held that the NCAA's "no-draft" and "no-agent" rules, which disqualify a student-athlete from further intercollegiate competition if the student- athlete enters a professional draft or contacts an agent, are reasonable because they are procompetitive. See McCormack, 845 F.2d at 1343; Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1087-94 (7th Cir. 1992) (holding that NCAA's "no-draft" and "no-agent" rules do not have an anticompetitive impact on a discernable market); Gaines, 746 F. Supp. at 746; Jones, 392 F. Supp. at 304 (noting in dicta that "any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals"); see also Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 379

(D. Ariz. 1983) (holding that NCAA sanctions such as rendering a college team ineligible for post-season play and for television appearances imposed for violations of rule against providing compensation to student-athletes did not iolate antitrust law because sanctions were reasonably related to the NCAA's goals of preserving amateurism and promoting fair competition).

We agree with these courts that, in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field. See McCormack, 845 F.2d at 1345. Likewise, the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive. Clearly, the rule discourages institutions with graduate or professional schools from inducing undergraduates at other institutions to forgo participating in the athletic programs at their undergraduate institutions in order to preserve eligibility to participate in intercollegiate athletics on a postbaccalaureate basis. Likewise, the rule discourages undergraduates from forgoing participation in athletic programs on their own initiative to preserve eligibility on a postbaccalaureate basis at another institution. Indeed, we think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted.

B. TITLE IX CLAIM

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. S 1681(a). Intercollegiate athletics is an educational program or activity within the statute. See 20 U.S.C. S 1687; 34 C.F.R. S 106.41 (a).[5] Thus, the NCAA is subject to Title IX provided that it receives federal financial assistance within the meaning of section 1681(a).

Federal regulations define "recipient" as including

> any public or private agency, institution or organization, or other entity, or any other person, to whom Federal financial

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[5]The statute defines "program or activity" as

> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or . . .
>
> (4) any other entity which is established by two or more of the entities described in paragraph (1) (2), or (3);

any part of which is extended Federal financial assistance . . . .

20 U.S.C. S 1687. In addition, federal regulation in part provides that

> [n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. S 106.41(a).

> assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. S 106.2(h) (1997) (emphasis added). The plain language of the statute and regulation is quite broad and encompasses indirect recipients of federal funds. See Grove City College v. Bell, 465 U.S. 555, 564, 104 S.Ct. 1211, 1216 (1984) (holding that a college received federal funds where the funds were granted to its students asfinancial aid rather than directly to the college because the language of the section does not distinguish between direct and indirect receipt of federal funds).

The Court of Appeals for the Sixth Circuit addressed the applicability of Title IX to a state high school athletic association in Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994). In Horner, the plaintiffs, female student-athletes, alleged that the association received dues from its member high schools, many of which receive federal funds, and that a state statute authorized the designation of the association as an agent of the state board of education. See Ky. Rev. Stat. Ann. S 156.070(1), (2). In that capacity, the association performed the board's statutory duties with respect to interscholastic sports. The plaintiffs alleged that the association violated Title IX by sanctioning fewer sports for girls than boys and by refusing to sanction a particular sport for girls. The court held that the association would be subject to Title IX if the plaintiff could prove her allegations with respect to its functioning and financing. See id.

The district court attempted to distinguish Horner by noting

that "even if the [NCAA] receives dues from member schools which receive federal funds, unlike the situation in Horner, there is no statutory connection between the parties such that the Defendant can be considered the 'agent' of its member institutions that receive federal financial assistance." See Smith, 978 F. Supp. at 220. Thus, according to the district court, the distinguishing characteristic here is the lack of statutory authority for the NCAA. We disagree. The NCAA acts no less than the association in Horner as an agent of its member institutions merely because it lacks statutory authority for its activities. The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their surrogate with respect to athletic rules.

In its construction of section 504 of the Rehabilitation Act, which contains language identical to that of Title IX in 20 U.S.C. S 1681(a) regarding receipt of federal assistance,[6] the Supreme Court has indicated that Congress, as in Title IX, did not distinguish between direct and indirectfinancial assistance. See United States Dep't of Transp. v. Paralyzed Veterans of Amer., 477 U.S. 597, 606-07, 106 S.Ct. 2705, 2711-12 (1986) (citing Grove City College,

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[6]The Rehabilitation Act states that

> [n]o otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. S 794 (emphasis added).

465 U.S. at 564, 104 S.Ct. at 1216 (holding that a college received federal funds where the funds were granted to its students as financial aid rather than directly to the college)). The Court, however, drew a distinction between those entities which indirectly benefit from federal assistance and those that indirectly receive federal assistance, holding that only those the receive federal funds are within the statute. Thus, the Court rejected the argument that all commercial airlines are "recipients" of federal funds simply because airport operators receive federal funds which benefit the airlines in the form of runways, inter alia. See id. at 606, 106 S.Ct. at 2711. The Court defined "recipient" from a contractual perspective, limiting "recipients" of federal funds, and therefore the obligations of the act, to those who are in a position to decide whether to "receive" federal funds and thereby accept the concomitant obligations of the statute. See id.[7]

Notwithstanding the parallel language of the Rehabilitation Act and Title IX, we do not apply the Paralyzed Veterans Court's definition of "recipient" to Title IX in the circumstances here. In our view, the broad regulatory language under Title IX, which defines a recipient as an entity "which operates an educational program or

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[7]The Court noted that "Congress enters into an arrangement in the nature of a contract with the recipients of the[federal] funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." 477 U.S. at 605, 106 S.Ct. at 2711. The Court further noted that "[b]y limiting coverage to recipients, Congress imposes the obligations of S 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to `receive' federal funds." Id. at 606, 106 S.Ct. at 2711.

activity which receives or benefits" from federal funds, 34 C.F.R. S 106.2(h) (1997) (emphasis added), requires that we reach a different result. Application of Paralyzed Veterans here would render the regulatory definition of "recipient" under Title IX a nullity. After all, unlike the commercial airlines in Paralyzed Veterans, the NCAA is not merely an incidental beneficiary of federal funds. Quite to the contrary, it seems to us that the relationship between the members of the NCAA and the organization itself is qualitatively different than that between airlines and airport operators, for we think that it would be unreasonable to characterize the latter as surrogates for the airlines. Given the breadth of the language of the Title IX regulation defining recipient, we hold that allegations in Smith's proposed amended complaint, that the NCAA receives dues from its members which receive federal funds, if proven, would subject the NCAA to the requirements of Title IX.

The district court found that Smith's original complaint did not allege that the NCAA was a recipient of federal funds, and therefore dismissed the Title IX claim. See Smith, 978 F. Supp. at 219. Smith's complaint included the following allegation:

> This action is a request for declaratory relief challenging sex discriminatory practices and policies of the NCAA, Hofstra University, and the University of Pittsburgh in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. S 1681. Title IX prohibits sex discrimination in an educational program or activity receiving federal financial assistance.

Compl. ¶ 25. We agree that Smith's original complaint did not contain an allegation that the NCAA receives federal financial

assistance. Thus, the district court properly dismissed her original Title IX complaint.[8]

But we have not confined our analysis to Smith's original complaint for, as we have indicated, following the district court's dismissal of her claims, Smith moved for leave to amend her complaint pursuant to Fed. R. Civ. P. 15. By order dated June 5, 1997, the district court denied this motion, stating only that the motion "is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997." App. at 117. Because the district court gave no further explanation, it is unclear whether the district court was unaware of its discretion to allow the proposed amended complaint despite the dismissal or whether the court believed that the amendment would be futile even if pleaded. Nevertheless, under either view, the district court erred in denying Smith's motion for leave to amend.

Pursuant to Fed. R. Civ. P. 15(a), a plaintiff has an absolute right to amend her complaint once at any time before a responsive pleading is served. Thereafter, a plaintiff must seek leave of the district court to amend her pleading, and although it is within the district court's discretion, district courts should grant such requests freely when justice so requires. Id.

After the district court enters judgment on a motion to

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[8]However, Judge McKee would hold that Smith's original complaint sufficiently states that the NCAA receives federal financial assistance under the pleading requirements that we apply to pro se complaints. See Zillich v. Lucht, 981 F.2d 694 (3d Cir. 1992) ("When, as in this case, plaintiff is a pro se litigant, we have a special obligation to construe [her] complaint liberally.").

dismiss, a plaintiff no longer may amend her complaint as of right. See Newark Branch, NAACP v. Town of Harrison, 907 F.2d 1408, 1417 (3d Cir. 1990); Kauffman v. Moss, 420 F.2d 1270, 1276 (3d Cir. 1970). However, even though Smith no longer was entitled to amend her complaint as of right after the dismissal of her claim, it was within the district court's discretion to grant her leave to amend. See Newark Branch, NAACP, 907 F.2d at 1417; Kauffman, 420 F.2d at 1276; In re Sverica Acquisition Corp. v. Load Rite Trailers, Inc., 179 B.R. 457, 459 (E.D. Pa. 1995); Fearon v. Community Fed. Sav. & Loan of Phila., 119 F.R.D. 13, 15 (E.D. Pa. 1988) (plaintiff had no right to amend where both complaint and action dismissed, but could seek leave of court to do so). Thus, her motion to amend was not moot in the sense of being too late or being foreclosed by the dismissal.

While "the grant or denial of an opportunity to amend is within the discretion of the District Court . . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of that discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). On the other hand, a district court justifiably may deny leave to amend on grounds such as undue delay, bad faith, dilatory motive, and prejudice, as well as on the ground that an amendment would be futile. See id.; In re Burlington Coat Factory Sec. Litig., 114 F.3d at 1434; Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir. 1983). An amendment is futile if the complaint, as amended, would not survive a motion to dismiss for failure to state a claim

upon which relief could be granted. See In re Burlington Coat Factory, 114 F.3d at 1434 (citing Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996)). In determining whether the amendment would be futile, the district court applies the same standard of legal sufficiency as under Fed. R. Civ. P. 12(b)(6). See Id.

Smith alleged facts in her proposed amended complaint which, if proven, would establish that the NCAA was a recipient of federal funds within the meaning of Title IX. Her motion states that she intended the amended complaint to cure any allegational defects, and the proposed amended complaint includes an allegation that the NCAA is an indirect recipient of federal funds. In particular, her proposed amended complaint alleges that "[t]he NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance." App. at 98. This allegation plainly alleges that the NCAA receives dues from member institutions, which receive federal funds. As discussed above, this allegation would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.

If a district court concludes that an amendment is futile based upon its erroneous view of the law, it abuses its discretion in denying a plaintiff leave to amend to include a legally sufficient allegation. See Centifanti v. Nix, 865 F.2d 1422, 1431 (3d Cir. 1989) (holding that the district court, which erred in its conclusion that

there was jurisdictional defect, abused its discretion in denying a plaintiff's motion for leave to amend his complaint because the proposed amendment would not cure the jurisdictional defect). Thus, if the district court denied Smith leave to amend because it viewed the proposed amendments as futile, it erred because the conclusion was based on an error of law. Furthermore, we see no basis to conclude that the district court justifiably could have denied the motion to amend on the grounds that Smith had acted in bad faith, with a dilatory motive, or had delayed unduly in bringing the motion or that granting the motion would prejudice the NCAA. Indeed, there is nothing in the record to support a conclusion that the district court denied the motion to amend on any of these grounds. Overall, therefore, we are satisfied that the district court abused its discretion in denying the motion to amend the complaint.[9]

IV. CONCLUSION

For the foregoing reasons, we will affirm the district court's dismissal of appellant's Sherman Act claim, vacate its dismissal of the Title IX claim, and reverse the district court's denial of her

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[9]We do not imply that we have any view of the merits of Smith's Title IX claim. The parties have not briefed the merits, and the district court will address those issues on remand if Smith can prove her allegations to support the applicability of Title IX to the NCAA. Thus, we emphasize that we merely hold that the amendment would not have been futile in the sense that it would not have pled adequately that the NCAA was subject to Title IX.

motion for leave to amend her complaint with respect to her Title IX claim. In light of this conclusion, we will remand to the district court for further proceedings consistent with this opinion and direct the district court to reinstate her state law contract claim, over which the district court declined to exercise jurisdiction pursuant to 28 U.S.C. S 1367(c). The parties will bear their own costs on this appeal.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 97-3346 and 97-3347

R.M. Smith

v.

National Collegiate Athletic Association

Renee M. Smith,
Appellant

On Appeal for the United States District Court for the Western District of Pennsylvania (D.C. Civil No. 96-01604)

Present: Greenberg, Nygaard, and McKee, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued February 12, 1998.

On consideration whereof, it is now here ordered thd adjudged by this Court that the judgment of the said District Court entered May 21, 1997 and the order entered June 6, 1997, be, and the same are hereby affirmed in so far as the dismissal of the Sherman Act claim, vacated in so far as the dismissal of the Title IX claim, reversed insofar as the denial of the motion for leave to amend the complaint with respect to the Title IX claim, and the cause is remanded to the said District Court with direction to reinstate the state law contract claim and for further proceedings in accordance with the opinion of this Court. Each party is to bear its

own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: March 16, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-3346 and 97-3347

R.M. Smith

v.

National Collegiate Athletic Association

Renee M. Smith,
Appellant

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civ. No. 96-01604)

BEFORE: BECKER, Chief Judge, and SLOVITER, STAPLETON, MANSMAN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, MCKEE, AND RENDELL, Circuit Judges

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(ORDER ON REHEARING)

The petitions for rehearing filed by appellant Renee M. Smith, and appellee, National Collegiate Athletic Association, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

BY THE COURT:

s/_____
Circuit Judge

Dated: April 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. M. SMITH, Plaintiff, -vs- **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,** Defendant.	Civil Action No. **96-1604** Judge: **Ambrose**

OPINION and ORDER OF COURT

Pending before the Court is the Motion to Dismiss of the Defendant, the National Collegiate Athletic Association ("NCAA"), to dismiss the complaint filed pro se by the Plaintiff, R.M. Smith ("Plaintiff" or "Smith") pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 12(b)(6). Plaintiff is alleging violation of section 1 of the Sherman Act, 15 U.S.C. § 1 and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, as well as alleging a state law claim for breach of contract. For the reasons set forth below, Defendant NCAA's Motion to Dismiss will be granted.

STANDARD OF REVIEW

In deciding a motion to dismiss, all factual allegations and all reasonable inferences therefrom must be accepted as true and viewed in the light most favorable to the plaintiff. Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir.1988). A court may

dismiss a plaintiff's complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In ruling on a motion to dismiss for failure to state a claim, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." Colburn, 838 F.2d at 666. Further, courts construe pro se complaints, such as the ones sub judice, more liberally than complaints drafted by lawyers and grant dismissal of pro se complaints only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972).

FACTS

The Plaintiff has alleged the following in her Complaint which, for purposes of this motion to dismiss I will accept as true. Plaintiff graduated from high school in 1991, became a member of the intercollegiate volleyball team at St. Bonaventure University in the fall of 1991 and played volleyball at St. Bonaventure during the 1991-92 and 1992-93 athletic seasons. As a student- athlete, Plaintiff participated in intercollegiate events in multiple states within the United States. While participating in these intercollegiate events throughout the United States, Plaintiff as a student-athlete received awards, benefits and expenses permitted under Article 16 of the NCAA Manual. Plaintiff did not, at her own election, participate in

an intercollegiate sport at St. Bonaventure during the 1993-94 athletic season.

After graduating from St. Bonaventure, Plaintiff entered a Postbaccalaureate Program at Hofstra University, where Defendant NCAA denied eligibility to Plaintiff to participate in intercollegiate athletics during the 1994-95 athletic season. In 1995, Plaintiff entered into a second Postbaccalaureate Program at the University of Pittsburgh and again was denied eligibility by Defendant NCAA to play intercollegiate volleyball. Neither of the Postbaccalaureate programs entered into by Plaintiff were offered at St. Bonaventure, Plaintiff's undergraduate institution.

The basis for Defendant's denial to Plaintiff of eligibility to play intercollegiate sports during the 1994-95 and 1995-96 athletic seasons was its Postbaccalaureate Bylaw. The Postbaccalaureate Bylaw is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual and prohibits a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which his or her undergraduate degree was obtained. Plaintiff otherwise was in good academic standing and in compliance with all other requirements to participate in intercollegiate athletics during the 1994- 95 and 1995-96 athletic seasons. Both Hofstra University and the University of Pittsburgh appealed to the NCAA to waive the Postbaccalaureate Bylaw for Plaintiff but Defendant refused to waive the Bylaw with respect to Plaintiff and therefore, Plaintiff was denied athletic eligibility during the 1994-95 and 1995-96 athletic seasons.

Graduates from two-year colleges are eligible to compete at

other Division I institutions.

LEGAL ANALYSIS

I. Plaintiff's Sherman Act Claim.

At issue with respect to Plaintiff's Sherman Act claim is the Defendant's Postbaccalaureate Bylaw, which is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual and which prohibits a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the one from which his or her undergraduate degree was obtained. Plaintiff has alleged in her ***216** Complaint that: (1) Defendant violated § 1 of the Sherman Act in that it engaged in a contract, combination, and conspiracy to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states; (2) the creation and enforcement of Bylaws in the NCAA Manual are joint actions by the NCAA and its member institutions, including Hofstra University and the University of Pittsburgh; (3) the Defendant and member institutions contract, combine, and conspire to enforce the Bylaws in the NCAA Manual; (4) intercollegiate athletics are activities in or substantially affect interstate commerce; (5) Defendant denied Plaintiff intercollegiate athletic eligibility during the 1994-95 and 1995-96 athletic seasons; (6) the NCAA's decision to deny Plaintiff athletic eligibility was solely based upon the Postbaccalaureate Bylaw, found at Bylaw 14.1.8.2 of the 1993-94 NCAA Manual; (7) Hofstra University and the University of Pittsburgh both appealed to the Defendant to waive the Postbaccalaureate Bylaw for Plaintiff but the Defendant refused; (8) as a direct result of the NCAA's refusal

to waive the Postbaccalaureate Bylaw, Plaintiff was denied athletic eligibility during the 1994-95 and 1995-96 athletic seasons; (9) by an unreasonable restraint of trade, Plaintiff was injured in her business and property by not being permitted to participate in intercollegiate athletics at Hofstra University and the University of Pittsburgh during the 1994-95 and 1955-96 athletic seasons; (10) the Defendant's enforcement of the Postbaccalaureate Bylaw has an adverse anticompetitive effect, impairs and destroys competition and is unreasonable; and (11) enforcement of the Postbaccalaureate Bylaw cannot be justified by the NCAA especially when graduates from two-year colleges are eligible to compete at other Division I institutions. Complaint, ¶¶ 9-19.

Defendant first argues that Count I of Plaintiff's Complaint, which alleges that Defendant violated § 1 of the Sherman Act, must be dismissed for failure to state a claim upon which relief can be granted. Specifically, Defendant asserts that said claim must be dismissed because "[t]he alleged unlawful activities are not of a 'commercial' nature and therefore do not fall within the purview of the Sherman Act," or alternatively, if the Sherman Act is applicable to the facts as alleged by Plaintiff, because "the enforcement of the NCAA Bylaws are reasonable, and therefore lawful, as a matter of law." Defendant's Motion to Dismiss, ¶¶ 6-7. Thus, the threshold inquiry is whether or not the Sherman Act is even applicable to the instant claim by Plaintiff.

Section 1 of the Sherman Act states in pertinent part: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several

States, or with foreign nations, is declared to be illegal[.]" 15 U.S.C. § 1. As explained by the United States Supreme Court in Apex Hosiery Co. v. Leader et al., 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940):

> The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought (by these laws) was the prevention of the restraints to the competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 472-73, 60 S.Ct. at 985. The Court has further noted that "[t]he Court in Apex recognized that the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations ... which normally have other objectives." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 214 n. 7, 79 S.Ct. 705, 710 n. 7, 3 L.Ed.2d 741 (1959). Plaintiff claims that Defendant violated § 1 of the Sherman Act in that through its Postbaccalaureate Bylaw, it "engaged, combined and conspired to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states." Complaint, ¶ 9.

While the question of whether the Sherman Act reaches the actions of the NCAA when, through the Postbaccalaureate Bylaw, it sets eligibility standards for postgraduate student-athletes in intercollegiate athletics, has never been addressed by the federal

courts, the courts have examined the applicability of the Sherman Act in relation to other NCAA rules, regulations and plans. Thus, in National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the United States Supreme Court held that an NCAA plan that restricted the televising of the games of NCAA member institutions violated § 1 of the Sherman Act because it constituted a restraint upon the operation of a free market. To the contrary, in Jones v. National Collegiate Athletic Association, 392 F.Supp. 295 (D.Ma.1975) and Gaines v. National Collegiate Athletic Association, 746 F.Supp. 738 (M.D.Tn.1990), district courts held that the Sherman Act does not reach the actions of the NCAA in setting eligibility standards where NCAA eligibility rules barred student-athletes at their member institutions from participating in intercollegiate sports after (1) a student-athlete had played multiple seasons with various "amateur" teams, receiving compensation therefore (Jones) and (2) a student-athlete had entered the National Football League draft (Gaines).[1] Notably, in so holding, the Jones court explained:

> [t]he plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws. The 'competition' which the plaintiff seeks to protect does not originate in the

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[1]Like Plaintiff in the case sub judice, the plaintiff in Jones had alleged that his exclusion from participation in college sports reduced competition and thereby violated § 1 of the Sherman Act. In Gaines, the plaintiff argued that the defendants, by preventing college football players like himself from returning to college play for which they are otherwise eligible after an unsuccessful bid in the NFL draft, engaged in an unlawful exercise of monopoly power in violation of § 2 of the Sherman Act.

> marketplace or as a sector of the economy but in the hockey rink as part of the educational program of a major university. And, of equal significance, plaintiff has so far not shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage.

Id. at 303. Similarly, in College Athletic Placement Service, Inc. v. National Collegiate Athletic Association, 1974 WL 998, (D.N.J. August 22, 1974), aff'd, 506 F.2d 1050 (3d Cir.1974), the United States District Court for the District of New Jersey held that "[t]he NCAA's action in ratifying an amendment to its Constitution for the purpose of preserving educational standards in its member institutions does not come within the purview of the Sherman Act." Id. at *4. In College Athletic Placement Service, Inc., the provision at issue forbade eligibility to student-athletes who agreed or had agreed to be represented by an agent or other marketing organization. Additionally, the United States Supreme Court has stated with respect to NCAA regulations and the Sherman Act that "[t]he specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." Board of Regents, 468 U.S. at 117, 104 S.Ct. at 2969 (emphasis added). But see Banks v. NCAA, 746 F.Supp. 850, 857 (N.D.Ind.1990) ("[t]he Supreme Court cited Jones with apparent approval in NCAA v. Board of Regents, 4[68] U.S. at 102, n. 24, 104 S.Ct. at 2961 n. 24. Nonetheless, after a careful reading of NCAA v. Board of Regents, this court is unwilling to rely on a single district court

opinion [Jones] for the conclusion, sought by the NCAA, that the antitrust laws have no application to NCAA regulations concerning eligibility.").

Thus, based upon a reading of the relevant case law, it is clear that the Sherman Act is applicable to the NCAA with respect to those actions of the Defendant that are related to its commercial or business activities, but only to those such activities. See also Justice v. National Collegiate Athletic Association, 577 F.Supp. 356, 383 (D.Ariz.1983) ("[i]n sum, it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type ... is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose.").

Having so found, after careful consideration of the submissions of the parties and the case law on this issue, I can only conclude that the actions of the NCAA in refusing to waive the Postbaccalaureate Bylaw and allow the Plaintiff to participate in intercollegiate athletics is not the type of action to which the Sherman Act was meant to be applied. In other words, there is simply no logical way to conclude (through enforcement of the Postbaccalaureate Bylaw) that the NCAA is attempting to provide itself and its member institutions with a commercial advantage or that the result of the implementation of the Postbaccalaureate Bylaw is to provide the NCAA and its member institutions with any commercial advantage. Accordingly, Defendant's Motion to Dismiss Count I of Plaintiff's Complaint is granted for failure to state a claim upon which relief can be granted and Count I of Plaintiff's Complaint

is dismissed.

II. Plaintiff's Title IX Claim.

Count II of Plaintiff's claim alleges that Defendant has violated Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 et seq., in that it has granted a disproportionate number of waivers of its Bylaws to male student-athletes. Defendant moves to dismiss this claim on the basis that (1) Plaintiff has failed to allege that Defendant is a recipient of federal financial assistance and (2) Plaintiff cannot establish that it is a recipient of federal financial assistance which would render it subject to Title IX.[2]

In response, Plaintiff does not address Defendant's first argument, that she failed to plead that Defendant is a recipient of federal funding. Rather, Plaintiff focuses upon the second argument raised by Defendant, namely that Plaintiff cannot establish that Defendant is a recipient of federal funding. Specifically, Plaintiff argues that:

> in the instant case, the NCAA enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity. Further, the defendant benefits greatly

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[2]Defendant also argues that Plaintiff can offer no facts to support her conclusory allegation that the NCAA has engaged in sexual discrimination by granting more waivers of its Postbaccalaureate Bylaws to male student-athletes than female student athletes. This basis for dismissal of Count II is not, however, pled in its motion to dismiss and therefore, will not be considered in addressing Defendant's motion to dismiss. Further, I also note that in deciding Defendant's motion to dismiss Plaintiff's Title IX claim, I have not considered any of the extraneous documentation attached to Defendant's motion to dismiss.

> when students receive financial aid. If such funds were not available, student-athletes might not otherwise be financially able to participate in athletic programs due to the student-athletes's income limitations. Possibly, financial aid may be premised on the participation in intercollegiate athletics, especially when the NCAA Manual places limitations and regulations on the receipt of federal financial aid for student-athletes. Further, although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees.

Plaintiff's Opposition Brief, p. 6. Plaintiff further argues on this point that "[a]s a matter of public policy, this Court should subject NCAA actions regarding the operation of educational institutions to Title IX scrutiny." Id.

Defendant, in its Reply Brief in Support of Motion to Dismiss ("Defendant's Reply Brief") counters Plaintiff's contentions by arguing:

> [while] Plaintiff argues the NCAA indirectly receives federal aid by passing rules which govern the operation of intercollegiate athletics, she does not allege the NCAA receives federal funds to administer its programs or that the NCAA administers any federal funds in adopting rules which govern the operation of intercollegiate athletic events. Plaintiff simply strains an argument by attempting to stretch the definition of "recipient" to include the NCAA because its rules affect students who may receive federal aid and also participate in intercollegiate athletics. There simply is no legal basis to extend the definition beyond the purpose of Title IX, which is to prevent the use of federal resources to support gender discrimination in connection with these programs.
>
> * * *
>
> Because Plaintiff does not claim the NCAA administers federal funds in any way, she cannot show the NCAA used

federal funds to promote or support gender discrimination. Defendant's Reply Brief, pp. 3-4.

Title IX states: "[n]o person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Thus, Title IX prohibits sex discrimination under any education program or activity receiving federal funds. "Recipient" is defined as:

> any state or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution or organization, or other entity, or any other person, to whom Federal financial assistance is extended directly or through another recipient and which operates an educational program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h) (1997). As explained in Favia v. Indiana University of Pennsylvania, 812 F.Supp. 578 (W.D.Pa.) aff'd, 7 F.3d 332 (3d Cir.1993), Title IX "was intended to prevent the use of federal resources to support gender discrimination." Id. at 584, citing, Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

Addressing first Defendant's argument that Plaintiff's Title IX claim must be dismissed because of Plaintiff's failure to allege that the NCAA is a recipient of federal funds, although Plaintiff is appearing pro se and accordingly, I must construe her Complaint more liberally than a complaint drafted by an attorney and grant dismissal of said Complaint only if it appears beyond doubt that she

can prove no set of facts in support of her claim that would entitle her to relief, the fact remains that as pleaded, Plaintiff has not alleged that the NCAA is a "recipient" of federal funding. Absent such an allegation, I must conclude that she has failed to state a claim upon which relief can be granted and therefore, grant Defendant's Motion to Dismiss Count II of Plaintiff's Complaint.

Moreover, even assuming that I could infer from Plaintiff's Complaint that she had pleaded that Defendant was a recipient of federal funds based upon the "connections" with federal funding listed in Plaintiff's Opposition Brief and discussed above, i.e. because the NCAA enacts legislation to govern and operate intercollegiate athletics, which is an educational program or activity, because the NCAA benefits greatly when students receive financial aid in that were such funds not available, student-athletes might not otherwise be financially able to participate in athletic programs due to the student- athletes' income limitations, because possibly financial aid may be premised on the participation in intercollegiate athletics, especially when the NCAA Manual places limitations and regulations on the receipt of federal financial aid for student-athletes, and because although the income may not go directly back to the NCAA, the funding may ultimately be paid from the member institution to the NCAA in membership dues or other fees, I still would be compelled to hold that Plaintiff has failed to state a claim under Title IX upon which relief can be granted in that said "connections" with federal funding simply are too far attenuated to qualify Defendant NCAA as a recipient of federal funds thus subjected to the mandates of Title IX.

Notably, in so holding, I emphasize that I find the case sub judice distinguishable from that of Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 272 (6th Cir.1994). In Horner, the United States Court of Appeals for the Sixth Circuit held that the Kentucky High School Athletic Association ("KHSAA"), a voluntary, self-managing, unincorporated association of public, private and parochial schools, was a recipient of federal funds and therefore, subject to Title IX, because: (1) pursuant to Kentucky statute, it was designated as the agent for another Defendant, the Kentucky State Board for Elementary and Secondary Education, which was subject to Title IX, in its function of managing interscholastic athletics and (2) it received dues from member schools which received federal funds. Id. at 272. Specifically, the court stated:

> [t]he most persuasive evidence of the KHSAA's status as a recipient is the fact that its functions are statutorily decreed to be those of the Board. The association is able to perform those functions because state law expressly permits the Board to designate an agent to manage interscholastic athletics. Ky.Rev.Stat.Ann. § 156.07(1),(2). This, in combination with the fact that KHSAA receives dues from member schools which do receive federal funds, indicates that the association qualifies as an 'agent' which indirectly receives federal funds as described in 34 C.F.R. § 106.2(h), and is thus subject to Title IX.

Id., citing, Grove City College v. Bell, 465 U.S. 555, 564-70, 104 S.Ct. 1211, 1216-20, 79 L.Ed.2d 516 (1984). In the instant case, even if the Defendant receives dues from member schools which receive federal funds, unlike the situation in Horner, there is no statutory connection between the parties such that the Defendant can be considered the "agent" of its member institutions that receive federal financial assistance.

Accordingly, Defendant's Motion to Dismiss Count II of Plaintiff's Complaint for failure to state a claim upon which relief can be granted is granted and Count II of Plaintiff's Complaint is dismissed.

III. Plaintiff's Breach of Contract Claim.

In Count III of her Complaint, Plaintiff has brought a state law claim for breach of contract. Specifically, Plaintiff alleges that she is the third- party beneficiary of agreements between the NCAA and member institutions to enforce the NCAA Constitution and Bylaws, agreements which were breached when Defendant denied athletic eligibility to Plaintiff thereby preventing her from receiving the benefits of the agreements. Defendant moves to dismiss Count III of Plaintiff's Complaint on multiple grounds, only one of which need be addressed at this juncture in the proceedings.

Jurisdiction over Count III of Plaintiff's Complaint is premised solely upon 28 U.S.C. § 1367. Complaint, ¶ 30. Section 1367(c) states that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--... (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). In making the decision to decline to exercise jurisdiction under § 1367(c), the United States Court of Appeals for the Third Circuit instructs that I "should take into account generally accepted principles of 'judicial economy, convenience, and fairness to the litigants'." Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1284 (3d Cir.1993), quoting, United Mine Workers of America v. Gibbs, 383 U.S. 715,

726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Given my above holdings dismissing Counts I and II of Plaintiff's Complaint, the claims in Plaintiff's Complaint over which I had original jurisdiction, and taking into account the generally accepted principles of judicial economy, convenience and fairness to the litigants, I see no reason, given the preliminary stage at which this action is presently postured, to retain jurisdiction over Plaintiff's state law breach of contract claim and thus, I hereby elect under § 1367(c) not to exercise supplemental jurisdiction over Plaintiff's state law claim contained in Count III. Accordingly, Defendant's Motion to Dismiss Count III of Plaintiff's Complaint as a matter of law is granted and Count III of Plaintiff's Complaint is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

R. M. SMITH, Plaintiff, -vs- **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,** Defendant.	Civil Action No. **96-1604** Judge: **AMBROSE**

ORDER OF COURT

AND NOW, this 21st day of May, 1997, after careful consideration of the submissions of the parties and for the reasons set forth In the Opinion accompanying this Order, it is hereby ORDERED that Defendant's Motion to Dismiss Plaintiff's Complaint (Docket # : 4) is GRANTED in its entirety.

It is further ORDERED that Plaintiff's pending Motion for Disqualification Due to Conflict of Interest (Docket # : 11) is DISMISSED as moot.

BY THE COURT:

s/ Donetta W. Ambrose
Donetta W. Ambrose
U.S. District Judge

United States District Court for the Western District of Pennsylvania, Pittsburgh Division

[handwritten]

June 5, 1997

ORDER

The Motion to Amend Complaint (Doc. No. 18) is denied as moot, the court having granted defendant's motion to dismiss on May 20, 1997.

Donetta W. Ambrose

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION

R. M. Smith, Plaintiff, v. **National Collegiate Athletic Association**, Defendant, **Hofstra University**, Defendant, and **The University of Pittsburgh,** Defendant.	Case No: **96-1604** Judge: **Ambrose** AMENDED COMPLAINT

Preliminary Statement

3. Plaintiff is a citizen of the State of Ohio.

4. Plaintiff graduated from high school in 1991, became a member of intercollegiate volleyball team at St. Bonaventure University in the fall of 1991, and continued to play volleyball during the 1991-92 and 1992-93 athletic seasons. As a student-athlete, Plaintiff participated in intercollegiate competitions in many different states. In and amongst these several states, the plaintiff as a student-athlete received awards, benefits, and expenses permitted under Article 16 of the NCAA Manual. During the 1993-94 athletic year,

Plaintiff elected not to participate in an intercollegiate sport at St. Bonaventure.

5. The National Collegiate Athletic Association [NCAA] is an unincorporated association having its principal place of business the state of Kansas at 6201 College Blvd., Overland Park. Hofstra University is a not for profit corporation having its principal place of business in the state of New York at 1100 Hempstead Turnpike, Hempstead, New York. The University of Pittsburgh is a not for profit corporation having its principal place of business at 5th Avenue and Bigelow Boulevard, Pittsburgh, Pennsylvania.

6. After graduating from St. Bonaventure, Plaintiff entered into a Postbaccalaureate Program at Hofstra University, where Defendant denied eligibility to Plaintiff to participate in intercollegiate athletics during the 1993-94 season. Then, in 1994 Plaintiff entered into a second Postbaccalaureate Program and was again denied eligibility by Defendant. Neither of the Postbaccalaureate Programs were offered at Plaintiff's Undergraduate Institution.

7. During the 1994-95 and 1995-96 athletic years, Defendant denied eligibility to the plaintiff based on the *Postbaccalaureate Bylaw*, which prohibits a student-athlete from participating in intercollegiate athletics at a Postgraduate Institution other than the one from which his or her undergraduate degree was obtained. Otherwise, the plaintiff was in good academic standing and in compliance

with all other requirements to participate in intercollegiate athletics.

COUNT I

8. Plaintiff alleges and realleges each and every allegation contained in paragraphs 1 to 5 as if completely set forth and wholly rewritten herein.

Jurisdiction and Venue

9. Jurisdiction is conferred on this court by 28 U.S.C. §1337.

10. Venue is proper under 28 U.S.C. § 1391(b)(2).

Factual Allegations

11. This action arises under the antitrust laws of the United States more particularly the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and the Clayton Act, §15, as hereinafter more fully appears.

12. The Sherman Act's reach is as expansive as the scope of power under the Interstate Commerce Clause.

13. Activities within the "flow of commerce" or "affecting commerce" are within the Sherman Act's reach.

14. The defendants engaged in a contract, combination, or conspiracy to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states.

15. The creation and enforcement of Bylaws in the NCAA Manuals are joint actions by the NCAA, a private, voluntary, unincorporated association, and its member institutions, which are primarily colleges and universities (including

Hofstra University and the University of Pittsburgh), conferences and associations, and other educational institutions.

16. The NCAA and Member Institutions contract, combine, and conspire to enforce the Bylaws in the NCAA Manual.

17. Intercollegiate athletics are activities in or substantially affecting interstate commerce.

18. The defendants' denial of Plaintiff's eligibility had more than an insubstantial effect on the interstate commerce of intercollegiate athletics.

19. The services of student-athletes is necessary and very important to the entire operation of intercollegiate athletics.

20. Out-of -state patrons would not have traveled interstate but for Plaintiff's services in athletic competitions.

21. Defendant, NCAA, denied intercollegiate-athletic eligibility to Plaintiff during the 1994-1995 and 1995-1996 athletic seasons.

22. Based on the NCAA's decision, Hofstra University denied eligibility to Plaintiff during the 1994-1995 season.

23. Also based on the NCAA decision, the University of Pittsburgh denied athletic eligibility to Plaintiff during the 1995-1996 year.

24. The decision to deny athletic eligibility to Plaintiff was premised solely on the *Postbaccalaureate Bylaw*, which is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual.

25. Hofstra University and the University of Pittsburgh appealed to the NCAA to waive the *Postbaccalaureate Bylaw* for Plaintiff, but Defendant denied a waiver of the *Postbaccalaureate Bylaw*.

26. As a direct result of Defendants' refusal to waive and continued enforcement of the *Postbaccalaureate Bylaw*, the plaintiff was denied athletic eligibility during the said years.

27. The enforcement of the *Postbaccalaureate Bylaw* in this case does not protect amateurism.

28. Even if the Defendants did have a legitimate goal to pursue in enforcing the legislation, less restrictive measures could have effectuated their purpose.

29. Under NCAA rules and regulations, it is possible for graduates from two-year colleges to be eligible to compete at Division I schools and transfer students to be eligible at other institutions.

30. The NCAA's and universities' enforcement of the *Postbaccalaureate Bylaw* has an adverse anticompetitive effect, impairs and destroys competition, and is unreasonable.

31. By denying eligibility to Plaintiff, there has been a reduction in the provision of student-athlete services in the market.

32. Enforcement of the *Postbaccalaureate Bylaw* results in the complete preclusion of graduate students who enter into a graduate program not offered an their undergraduate institution cannot be justified by the defendants.

33. By an unreasonable restraint of trade, Plaintiff was injured in her business and property by not being permitted to participate in intercollegiate athletics at Hofstra University or the University of Pittsburgh during the said years.

34. The NCAA places limitations on employment for student-athletes during the semester.

35. For an individual to receive the same type of training and services available through the varsity programs at Hofstra University and the University of Pittsburgh, she would have to hire coaches, trainers, dieticians, rent gymnasiums, equipment, and apparel, pay for travel, lodging, and meals at her own expense.

36. An individual likely would never be able to attain the same level of competition available in the intercollegiate athletic programs at the universities outside of these environments.

37. Participation in intercollegiate athletics is a unique once in a life-time opportunity.

38. In engaging in the intercollegiate athletics, Plaintiff received many benefits and advantages from the activities.

39. Because of the many advantages, Plaintiff considered her participation in intercollegiate athletics to be an occupation, profession, and employment engaged in for a gain or livelihood.

40. The services provided to student-athletes are very valuable.

41. If the benefits, advantages, and gains were quantified into dollar amounts, the Plaintiff was and would have been well-

compensated for her services as a student-athlete.

42. Plaintiff generated revenues at athletic competitions through the purchase of athletic tickets at events by patrons, who would not have purchased tickets to the event or traveled interstate but for the existence of Plaintiff's services in intercollegiate athletics.

43. Defendants' denial of eligibility ceased the Plaintiff's ability to generate interstate revenues and preempted her being able to compete and from receiving any compensation for her services as a student-athlete.

44. The Defendants' alleged unlawful activities are commercial in nature because Plaintiff is precluded from receiving unique benefits of intercollegiate competition.

45. The defendants' denial of eligibility impacts the competition by a complete preclusion of a competitor in intercollegiate athletics from competition.

46. The reduction in competition caused a decrease in sales of tickets to intercollegiate athletics.

47. Purchases in intercollegiate athletics were changed in some way by the defendants restraint of trade.

48. The defendants' denial of eligibility to Plaintiff impacts the individual teams at the universities, women's intercollegiate volleyball, and intercollegiate athletics by having fewer players, less skills available, and fewer consumers.

49. The Defendants' denial of eligibility to Plaintiff affects interstate commerce by having fewer athletes travel, lodge,

and eat in interstate commerce and consumers travel to purchase tickets to view the services of Plaintiff and goods and services while traveling interstate.

50. The Defendant's denial of eligibility to Plaintiff affects potential participants by decreasing the available services within the market for consumers.

51. The Defendants' alleged unlawful activities are commercial in nature by affecting interstate commerce.

52. The market of intercollegiate athletics has a sufficient nexus with interstate commerce to support federal jurisdiction.

53. By maintaining a strict control on all aspects of intercollegiate athletics, the NCAA benefits by having its Member Institutions blindly follow its decisions for fear of sanctions.

54. By prohibiting the flow of athletes between institutions per the *Postbaccalaureate Bylaw*, the Member Institutions must seek the approval of the NCAA before taking any actions.

55. By requiring every action of Member Institutions to be approved, the NCAA is maintaining and strengthening its market power.

56. By enforcing the *Postbaccalaureate Bylaw*, the NCAA is providing itself with a competitive advantage.

57. Intercollegiate athletics comprises a sector of the economy.

58. The injury to Plaintiff's business and property was caused by reason of the limitation of trade and commerce placed by Defendants.

59. The injury is was proximately caused by the Defendants actions.

60. Plaintiff exhausted all administrative appeals to the NCAA and Universities during the said years.

COUNT II

61. Plaintiff alleges and realleges each and every allegation contained in paragraphs 1 to 52 as if completely set forth and wholly rewritten herein.

Jurisdiction and Venue

62. Jurisdiction is conferred on this Court by 20 U.S.C. § 1681, 28 U.S.C. § 1331, and 28 U.S.C. § 1343(a)(4).

63. Jurisdiction for declaratory and other relief is invoked pursuant to 28 U.S.C. §§ 2201 and 2202.

64. Venue is proper under 28 U.S.C. § 1391(b)(2).

Factual Allegations

65. This action is a request for a declaratory relief challenging sex discriminatory practices and policies of the NCAA, Hofstra University, and the University of Pittsburgh in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. Title IX prohibits sex discrimination in an educational program or activity receiving federal financial assistance.

66. The NCAA panels that review requests for exceptions to NCAA Bylaws engaged in a pattern and practice of

discrimination on the basis of sex by granting a far greater number of waivers to male student-athletes in an educational activity receiving federal funds.

67. The NCAA is a recipient of federal funds because it is an entity which receives federal financial assistance through another recipient and operates an educational program or activity which receives or benefits from such assistance.

68. Hofstra University is a recipient of federal funds.

69. The University of Pittsburgh is a recipient of federal funds.

70. Plaintiff alleges that Defendant, NCAA, practiced sex discrimination policies in denying her a waiver and athletic eligibility in an activity receiving federal funds.

71. The universities enforced the decision to deny Plaintiff eligibility.

72. By not granting a waiver of *Postbaccalaureate Bylaw* and denying eligibility to Plaintiff, Defendants excluded Plaintiff from participation in an educational program or activity (specifically intercollegiate athletics), thus violating 20 U.S.C. § 1681.

COUNT III

73. Plaintiff alleges and realleges each and every allegation contained in paragraphs 1 to 64 as if completely set forth and wholly rewritten herein.

Jurisdiction

74. Jurisdiction is proper under 28 U.S.C. § 1367 because this

claim is part of the same case or controversy from which the other actions arise.

Factual Allegations

75. In the NCAA Constitution and Bylaws, the defendant assumes direct obligations to the student-athletes. Relevant sections of the NCAA Constitution include but are not limited to *Purposes*, *Fundamental Policy*, and *The Principle of Student-Athlete Welfare*.

76. One of the purposes the said bylaws is to give the student-athletes rights to which they would not otherwise be entitled.

77. The clear intention of the parties in viewing the instrumentalities as a whole is to maintain intercollegiate athletics as a fundamental part of the educational process.

78. Further, the student-athletes are made parties to these contractual agreements between the NCAA and Member Institutions by signing all of the agreements and forms with the NCAA and Member Institutions.

79. Through and by its actions of denying athletic eligibility to the plaintiff, the defendant has denied the benefits of these assumed obligations to the plaintiff.

80. Thus, Plaintiff, a third-party beneficiary and a party to the agreements between the NCAA and Member Institutions to enforce the NCAA Constitution and Bylaws, was injured by not receiving the said direct benefits and performance.

WHEREFORE, Plaintiff demands that:

A. Defendants immediately be enjoined from continued enforcement of the *Postbaccalaureate Bylaw*.

B. Plaintiff have judgment against Defendant in the amount of $500,000 for loss of right to compete, loss of enjoyment, and mental anguish.

C. The appropriate damages be trebled.

D. Defendants be declared to have engaged in a pattern and practice of discrimination against w omen on the basis of sex in intercollegiate athletics in violation of Title IX.

E. Defendants pay to Plaintiff the costs of this action and reasonable attorney's fees to be allowed to Plaintiff by the court.

F. Any other further relief that the court deems appropriate.

Respectfully submitted,

_____

Renee M. Smith, *Pro Se Plaintiff*
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION

R. M. Smith, Plaintiff,	Case No: 96-1604
v.	Judge Ambrose
National Collegiate Athletic Association, Defendant.	**COMPLAINT**

Preliminary Statement

1. Plaintiff is a citizen of the State of Ohio.
2. Defendant is an unincorporated association having its principal place of business the state of Kansas at 6201 College Blvd., Overland Park.
3. Plaintiff graduated from high school in 1991, became a member of intercollegiate volleyball team at St. Bonaventure University in the fall of 1991, and continued to play volleyball during the 1991-92 and 1992-93 athletic seasons. As a student-athlete, Plaintiff participated in intercollegiate competitions in many different states. In and amongst these several states, the plaintiff as a student-athlete received awards, benefits, and expenses permitted under Article 16 of the NCAA Manual. During the 1993-94 athletic year, Plaintiff elected not to participate in an intercollegiate sport

at St. Bonaventure.

4. After graduating from St. Bonaventure, Plaintiff entered into a Postbaccalaureate Program at Hofstra University, where Defendant denied eligibility to Plaintiff to participate in intercollegiate athletics during the 1993-94 season. Then, in 1994 Plaintiff entered into a second Postbaccalaureate Program and was again denied eligibility by Defendant. Neither of the Postbaccalaureate Programs were offered at Plaintiff's Undergraduate Institution.

5. During the 1994-95 and 1995-96 athletic years, Defendant denied eligibility to the plaintiff based on the *Postbaccalaureate Bylaw*, which prohibits a student-athlete from participating in intercollegiate athletics at a Postgraduate Institution other than the one from which his or her undergraduate degree was obtained. Otherwise, the plaintiff was in good academic standing and in compliance with all other requirements to participate in intercollegiate athletics.

COUNT I

1. Plaintiff alleges and realleges each and every allegation contained in paragraphs 1 to 5 as if completely set forth and wholly rewritten herein.

Jurisdiction and Venue

2. Jurisdiction is conferred on this court by 28 U.S.C. §1337. The action arises under 15 U.S.C. §1 and 15 U.S.C. § 15, as hereinafter more fully appears.

10. Venue is proper under 28 U.S.C. § 1391(b)(2).

Factual Allegations

11. The defendant violated §1 of the Sherman Act, entitled "An Act to protect trade and commerce against unlawful restraints," in that the defendant engaged in a contract, combination, and conspiracy to place unlawful restraints upon the trade and commerce of intercollegiate athletics between the several states.

12. The creation and enforcement of Bylaws in the NCAA Manuals are joint actions by the NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA), a private, voluntary, unincorporated association, and its member institutions, which are primarily colleges and universities (including Hofstra University and the University of Pittsburgh), conferences and associations, and other educational institutions.

13. The NCAA and member institutions contract, combine, and conspire to enforce the Bylaws in the NCAA Manual.

14. Intercollegiate athletics are activities in or substantially affecting interstate commerce.

15. Defendant, NCAA, denied intercollegiate-athletic eligibility to Plaintiff during the 1994-95 and 1995-96 athletic seasons.

16. The decision to deny athletic eligibility to Plaintiff was premised solely on the *Postbaccalaureate Bylaw*, which is enumerated as Bylaw 14.1.8.2 in the 1993-94 NCAA Manual.

17. Hofstra University and the University of Pittsburgh appealed to the NCAA to waive the *Postbaccalaureate Bylaw* for Plaintiff, but Defendant denied a waiver of the *Postbaccalaureate Bylaw*.

18. As a direct result of the defendant's refusal to waive the *Postbaccalaureate Bylaw*, the plaintiff was denied athletic eligibility during the said athletic seasons.

19. Thus, by an unreasonable restraint of trade, Plaintiff was injured in her business and property by not being permitted to participate in intercollegiate athletics at Hofstra University or the University of Pittsburgh during the said years.

20. The NCAA's enforcement of the *Postbaccalaureate Bylaw* has an adverse anticompetitive effect, impairs and destroys competition, and is unreasonable.

21. Enforcement of the *Postbaccalaureate Bylaw* cannot be justified by the defendant especially when graduates from two-year colleges are eligible to compete at other Division I institutions.

22. Plaintiff exhausted all administrative appeals to the NCAA during the said years.

COUNT II

23. Plaintiff alleges and realleges each and every allegation contained in paragraphs 1 to 20 as if completely set forth and wholly rewritten herein.

Jurisdiction and Venue

24. Jurisdiction is conferred on this Court by 20 U.S.C. § 1681,

28 U.S.C. § 1331, and 28 U.S.C. § 1343(4).

25. Jurisdiction for declaratory and other relief is invoked pursuant to 28 U.S.C. §§ 2201 and 2202.

26. Venue is proper under 28 U.S.C. § 1391(b)(2).

Factual Allegations

27. This action is a request for a declaratory relief challenging sex discriminatory practices and policies of the NCAA, Hofstra University, and the University of Pittsburgh in violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681. Title IX prohibits sex discrimination in an educational program or activity receiving federal financial assistance.

28. The NCAA panels that review requests for exceptions to NCAA Bylaws engaged in a pattern and practice of discrimination on the basis of sex by granting a far greater number of waivers to male student-athletes.

29. Plaintiff alleges that Defendant practiced sex discrimination policies in denying her a waiver and athletic eligibility.

30. By not granting a waiver of *Postbaccalaureate Bylaw* and denying eligibility to Plaintiff, Defendant excluded Plaintiff from participation in an educational program or activity (specifically intercollegiate athletics), thus violating 20 U.S.C. § 1681.

COUNT III

31. Plaintiff alleges and realleges each and every allegation

contained in paragraphs 1 to 28 as if completely set forth and wholly rewritten herein.

Jurisdiction

32. Jurisdiction is proper under 28 U.S.C. § 1367 because this claim is part of the same case or controversy from which the other actions arise.

Factual Allegations

33. Student-athletes are third-party beneficiaries of Defendant's and member institutions' agreements to enforce the NCAA Constitution and Bylaws.

34. In the NCAA Constitution and Bylaws, the defendant assumes direct obligations to the student-athletes. Relevant sections of the NCAA Constitution include but are not limited to *Purposes*, *Fundamental Policy*, and *The Principle of Student-Athlete Welfare*.

35. Through and by its actions of denying athletic eligibility to the plaintiff, the defendant has denied the benefits of these assumed obligations to the plaintiff.

36. Thus, Plaintiff, a third-party beneficiary of the NCAA Constitution and Bylaws, was injured by not receiving the said direct benefits.

WHEREFORE, Plaintiff demands that:

A. Defendant immediately be enjoined from continued enforcement of the *Postbaccalaureate Bylaw*.

B. Plaintiff have judgment against Defendant in the amount of

$500,000 for loss of right to compete, loss of enjoyment, and mental anguish.

C. The appropriate damages be trebled.

D. Defendant be declared to have engaged in a pattern and practice of discrimination against women on the basis of sex in intercollegiate athletics in violation of Title IX.

E. Defendant pay to Plaintiff the costs of this action and reasonable attorney's fees to be allowed to Plaintiff by the court.

F. Any other further relief that the court deems appropriate.

Respectfully submitted,

_____

Renee M. Smith, *Plaintiff*
3812 Bates St.
Bates Hill Apt. #207
Pittsburgh, PA 15213
(412) 687-2472

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA PITTSBURGH DIVISION

R. M. Smith, Plaintiff, v. **National Collegiate Athletic Association**, Defendant.	Case No: **96-1604** Judge: **Ambrose**

Motion to Amend Complaint

Pursuant to Rule 15(a), Plaintiff moves this Honorable Court to permit amendments to the complaint and to add two additional defendants, listed individually in ¶¶ 1 and 2, to be joined as party defendants herein and directing the issuance and service of process upon them, and for grounds therefore shows:

1. Hofstra University, a not for profit corporation organized and existing under the laws of the state of New York, having its principal place of business at 1100 Hempstead Turnpike, Hempstead, New York.
2. The University of Pittsburgh, a corporation organized under the laws of the state of Pennsylvania, having its principal place of business at 5th Avenue and Bigelow Boulevard, Pittsburgh, Pennsylvania.
3. This is an action for relief from unreasonable restraints of trade (15 U.S.C.A. §1), violations of Title IX of the Educational Amendments of 1972 (20 U.S.C.A. §1681), and breaches of contract.

4. In adding the Universities to this action, jurisdiction is conferred to this court by 28 U.S.C. §1337, 20 U.S.C. §1681, 28 U.S.C. §1331, 28 U.S.C. §11343(4), 28 U.S.C. §2201, 28 U.S.C. §2202, 28 U.S.C. §1367.
5. Venue is proper under 28 U.S.C. §1391(b)(2).
6. Hofstra University and the University of Pittsburgh are proper party defendants because the claims arise under the same transaction and have questions of law and fact in common to all parties.
7. The universities denied intercollegiate eligibility to Plaintiff by conspiring, combining, and contracting to enforce unreasonable restraints on trade and commerce of intercollegiate athletics between the several states.
8. The universities enforced a decision based on a pattern or practice of sexual discrimination to deny athletic eligibility to Plaintiff.
9. The universities breached the contractual agreements which set forth the duty to maintain intercollegiate athletics as an integral part of the educational process.
10. The amendments to the complaint are made to cure any allegational deficiencies.
11. The Amended Complaint is attached in exhibit "A."

Respectfully submitted,

s/ Renee M Smith

Renee M. Smith, *Pro Se Plaintiff*
P.O. Box 2334
Wintersville, OH 43952 (614) 264-6986

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under an statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement. Providing for the establishment or maintenance or minimum resale prices in any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine

not exceeding fifty thousand dollars, or by both said punishments, in the discretion of the court.

15 U.S.C. §15. Suits By Persons Injured; Amount of Recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees.

1993-94 NCAA MANUAL – Constitution, Operating Bylaws, Administrative Bylaws, Administrative Organization

1.3 Fundamental Purpose

1.3.1 Basic Purpose. The competitive athletics programs of a member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

1.3.2 Obligations of Member Institutions. Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting. Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.

2.2 The Principle of Student-Athlete Welfare

Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of the student-athletes.

2.4 The Principle of Sound Academic Standards

Intercollegiate athletics programs shall be maintained as a vital component of the educational program, and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be

consistent with the policies and standards adopted by the institution for the student body in general.

14.1.8 Degree Status

14.1.8.1 Baccalaureate. To be eligible to participate (i.e., practice or compete) in intercollegiate athletics, a student-athlete shall be enrolled in at least a minimum full-time program of studies leading to a baccalaureate or equivalent degree, as determined by the regulations of the institution. *(Revised 1/10/92)*

14.1.8.2 Postbaccalaureate. A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a United States baccalaureate degree or its equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year or 10-semester period set forth in 14.2. *(Revised 1/10/90, 1/16/93 effective 8/1/93)*

14.2 Seasons of Competition: Five Year/ 10-Semester Rule

The student-athlete shall not engage in more that four seasons of intercollegiate competition in any one sport (see 14.0.6 and 14.3.3). An institution shall not permit a student-athlete to represent it in intercollegiate competition unless the individual completes all of his or her seasons of participation in all sports within the time periods specified below:

14.2.1 Five-Year Rule – Division I. The student-athlete shall complete his or her seasons of participation within five calender years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution, with time spent in the armed services, on official church missions or with recognized foreign aid services of the U.S. government being excepted. For foreign students, service in the armed forces or on an official church mission of the student's home country is considered equivalent to such service in the United States.

14.2.1.1 Determining the Start of the Five-Year Period. For purposes of starting the court of time under the five-year rule, a student-athlete shall be considered as registered at a collegiate institution (domestic or foreign; see 14.02.3) when the student-athlete initially registers in a regular term (semester or quarter) of an academic year for a minimum full-time program of studies, as determined by the institution, and attends the students first day of classes for that term (see 14.2.3).

14.6.4 Two-Year College Transfers. A student who transfers to a member institution from a two-year college or from a branch school that conducts an intercollegiate athletics program must complete an academic year of residence unless the student meets the following eligibility requirements applicable to the division of which the certifying institution is a member. Further, a transfer student-athlete admitted after the 12th day of classes may not utilize that semester or quarter for the purpose of establishing residency. *(Revised: 1/10/92)*

16.4.1 To Division I Institutions

16.4.1.1 Qualifier A transfer student from a two-year college who was a qualifier (per 14.3.1.1) is eligible for competition in Division I institutions the first academic year in residence only if the student has:

(a) Spent at least two semesters or three quarters in residence at the two-year college (excluding summer sessions), presented a minimum of 24 semester hours or 36 quarter hours of transferable degree credit with a cumulative minimum grade point average of 2.000 (see 14.6.4.4.3.2) and satisfactorily completed an average of at least 12 semester or quarter hours of transferable degree credit acceptable toward any baccalaureate degree program at the certifying institution for each academic term of attendance at the two-year college, or

(b) Graduated from the two-year college and completed satisfactorily a minimum of 48 semester or 72 quarter hours of transferable degree credit acceptable toward any baccalaureate degree program at the certifying institution. In addition, a student who first enrolled as a regular student in the two year college after August 1, 1988, must have a minimum cumulative grade-point average of 2.000 (see 14.6.4.4.3.2).

Bylaw 14.6.5 Four-Year College Transfers

See 13.1.1.3 for prohibition against contacting student-athletes of another four-year collegiate institution without permission of that institution's athletic director.

14.6.5.1 To Divisions I, II and III.

A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a Division I, Division II or Division III institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution. Further, a transfer student-athlete admitted after the 12th class day may not utilize that semester or quarter for the purpose of establishing residency.

14.6.5.1.1 Attendance for One Academic Year.

A transfer student from a four-year institution ~~who~~ attended a four-year institution at least one academic year shall be

eligible for financial aid and practice at a Division I or Division II institution under the rules of the institution and the conference at which the institution is a member, regardless of the student's qualification status (per 14.3.1.1 at the time of initial enrollment.

* * *

14.6.5.3 Exceptions or Waivers for Transfers From Four-Year Colleges.

A transfer student (other that one under disciplinary suspension per 14.6.1.4) from a four-year collegiate institution is not subject to the residence requirement for intercollegiate competition if any one of the following conditions is met. During the student-athlete's first academic year of full-time collegiate enrollment, such conditions may serve as a basis for a waiver of or an exception to the residence requirement only for Division I and Division II transfer students who, at the time of initial collegiate enrollment, met the requirements for "qualifiers" (set forth in 14.3.1) in the division to which they are transferring. (*Revised: 1/10/90, 1/10/91 effective 8/1/91*)

* * *

14.6.5.3.10 One-Time transfer Exception.

The student transfers to the certified institution from another four-year collegiate institution and all of the following conditions are met (for graduate students see also 14.1.7.1):

(a) The student is a participant in a sport other than

Division I basketball, Division I-A football or Division I men's ice hockey, at the institution to which the student is transferring. A participant in Division I-AA football at the institution to which the student is transferring may utilize this exception only if the participant transferred to the certifying institution from an institution that sponsors Division I-A football; (Revised: 1/16/93 effective 8/1/93, Revised: 1/11/94, 1/10/95)

(b) The student has not transferred previously from one four-year institution unless, in the previous transfer, the student-athlete received an exception per 14.5.5.3.7 (discontinued/nonsponsored sport exception); (Revised: 1/11/94, 1/11/97)

(c) The student is in good academic standing and meets the satisfactory-progress requirements. The transferring student must be one who would have been academically eligible had ha or she remained at the institution from which the student transferred, and he or she also must be eligible at the certifying institution as a regularly enrolled, full-time, degree-seeking student who was admitted in accordance with the regular, published entrance requirements of the institution. In Division I, the student shall bot be required to fulfill the necessary percentage-of-degree requirements per 14.4.3.2.1 and 14.4.3.2.2

at the previous institution; (Revised: 1/10/95, 1/9/96)

(d) The student's previous institution certifies in writing that it has no objection to the student's being granted an exception to the transfer residence requirement. If the student's previous institution denies his or her request for the release, the institution shall inform the student-athlete in writing that he or she, upon request, shall be provided a hearing conducted by an institutional entity or committee outside of the athletics department (e.g., the office of student affairs; office of the dean of students; or a committee composed of the faculty athletics representative, student-athletes and nonathletics faculty/staff members). The institution shall have established reasonable procedures for promptly hearing such a request; and (Revised: 1/11/94)

(e) If the student transfers to the certifying institution from a Division III member institution and meets the foregoing conditions, he or she may be eligible to compete but shall not receive athletically related financial aid during the first academic year in residence at the certifying institution.

14.6.6 "4-2-4" College Transfers

A student who transfers from a four year college to a two-year

college and then to the certifying institution shall complete one calendar year of residence at the certifying institution, unless the student:

[list of minimum credit and grade requirements].

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA PITTSBURGH DIVISION

R. M. Smith, Plaintiff,	Case No: **96-1604**
v.	Judge: **Ambrose**
National Collegiate Athletic Association, Defendant.	

Brief in Support of Motion to Amend Complaint

If the defendant has not yet served a responsive pleading, the plaintiff has a right to amend the pleadings once at any time before the responsive pleading is filed. Fed. R. Civ. P. 15(a). Even after dismissal, Rule 15 allows a plaintiff to amend because a motion to dismiss is not a responsive pleading especially when the order is appealable. *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir. 1995), *cert. denied*, -- U.S. --, 116 S. Ct. 2489 (1996), *Mayes v. Leipziger*, 729 F.2d 605, 607-608 (9th Cir. 1984), James W. Moore et al., Moore's Federal Practice ¶ 15.12 [1] (3d ed.) (noting a distinction between the split in the circuit courts based on whether the dismissal is considered a final and appealable order). *But See*

Moore's ¶15.21[1] n. 5 (listing circuits that do not permit amendment after motion to dismiss). As a powerful tool to structure litigation in the complaint, the permissive party joinder rule permits the plaintiff to join parties on the defendant's side. See Moore's at ¶ 20.02[2][a][I]. The plaintiff may join permissive parties by amending the complaint without leave of court. Fed. R. Civ. P. 15(a), Fed. R. Civ. P. 20(a), *Texas Energy Reserve Corp. V. Department of Energy*, 535 F. Supp. 615, 620-21, (D. Del. 1982), *aff'd*, 710 F.2d 814 (1983) (citing Moore's ¶ 15.16 [1]). In this case, the order is appealable and should be permitted to effectuate the purposes of the rule.

The trial judge, however, may deny the amendment if it is not in the interest of justice. Fed. R. Civ. P. Rule 15, *Skehan v. Board of Trustees of Bloomsbury State College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832, 100 S. Ct. 61, 62 L. Ed. 2d 41 (1979) (finding prejudice where motion adding defendants, who were not parties to the pretrial hearings, was made just before trial).

Under Rule 20, the plaintiff may join a "proper party" when the two-part test for "permissive joinder" is satisfied. First, the claim must "aris[e] out of the same transaction, or occurrence, or series

of transactions or occurrences," and second, "any question of law or fact common to all these persons will arise in the action." Fed. R. Civ. P. 20. Further, joinder is based on fact-based, common sense considerations to serve efficiency and consistency in judgments. Moore's ¶ 20.02[1][a].

First, this Motion to Amend Complaint does not require leave of court because the Defendant has not yet filed a responsive pleading even though the motion to dismiss has been granted. A motion to dismiss is a not a responsive pleading as defined under Rule 7(a). See Also *Vernell v. United States*, 819 F.2d 108 (5th Cir. 1987). Second, the parties meet all of the requirements of a proper party and should be joined under Rule 20.

Hofstra University and the University of Pittsburgh are proper defendants because their liability arises out of the same transactions and occurrences. By enforcing the NCAA's decision to deny athletic eligibility to student-athlete, R. M. Smith, these universities conspired, contracted, and/or combined to unreasonably restrain trade between the several states in violation of the Sherman Act. This anticompetitive practice resulted in impaired and destroyed competition and injured Plaintiff in her

business and property.

To demonstrate that a violation of antitrust laws occurred, the Plaintiff must show: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonable restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) th the restraint affected interstate commerce. *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 198 (3d Cir. 1991) (citing *Weiss v. York Hospital*, 745 F2d 786, 812 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777 (1985)). In *Hairston v. Pacific 10 Conference*, 1996 WL 689631 (9th Cir. Wash), the agreement to sanction members fulfilled the first element. Similarly, in the instant case, the NCAA's and Member Institution's agreements to enforce the NCAA Constitution and Bylaws constitute a contract, combination, or conspiracy, and thus satisfies the first prong.

In determining whether the denial of eligibility constituted an unreasonable restraint of trade, the Court should refer to a rule of reason analysis. *Id.* (citing *Bahn v. NME Hospitals, Inc*, 929 F.2d 1404, 1410 (9th Cir.), *cert. denied*, 502 U.S. 994, 112 S.Ct. 617 (1991). Under this test, the fact-finder determines whether the

harm outweighs the procompetitive effects. *Id.* The Court, however, should not preliminarily decide if it is the type of action to which antitrust laws apply. If the plaintiff shows that the restraint produces significant anticompetitive effects, then the defendant may present evidence of the procompetitive effects. At that time, the plaintiff may show that the legitimate objectives could have been accomplished in a substantially less restrictive manner. *Id.*

In *Hairston*, the court analyzed whether the sanctions placed on the University of Washington and its players constituted an unreasonable restraint of trade where illegal loans to players and violations resulted in sanctions. In challenging the decision to sanction the plaintiff met the initial burden of showing that the restraint produced relevant, not insignificant, anticompetitive effects within the relevant market. *Id.* at 3. When the defendants introduced procompetitive effects of the sanctions, the plaintiffs were unable to produce more than a "mere scintilla of evidence to support its case" because the imposed sanctions were within a range of appropriate penalties. *Id.*

In this case, the Plaintiff demonstrated significant anticompetitive effects by showing that she was completely

precluded from participating in intercollegiate athletics if she wished to pursue her educational objectives. If the Defendant were able to present any evidence to support its case of amateurism, even though it has not, then the Plaintiff points to the rules regulating the continuing eligibility for transfer students and athletes with associate degrees who continue on to Division I institutions. To achieve its objectives, the NCAA could have promulgated similar rules to control the continuing eligibility of graduate students especially when the desired programs are not offered at the undergraduate institution. Less restrictive alternatives exist for transfer students and associate degree students and could easily be instituted for graduate students.

Although the Court in *Justice v National Collegiate Athletic Association*, 577 F. Supp. 356, 383 (D. Az. 1983), noted that two distinct kinds of rule making activities occur, not all rules fall into these easily defined areas. Even though the Court accepts that procompetitive regulations do exist for maintaining amateurism in athletics, this is not one of those regulations, and the NCAA has offered no evidence to support such a claim. In light of the instant circumstances, which is an issue of first impression for the federal

courts, the Court must be able to see that in other cases challenging NCAA or athletic conference rules and decisions are distinguishable because under the rule of reason, sanctions are permissible because they are first the result of breaking an existing rule that promoted amateurism and second a punitive measure tailored to preventing that type of behavior. In the instant case, however, the Plaintiff is precluded from interstate competition by being sanctioned through the enforcement of an unjustifiable rule. Thus, the Court must concede that the enforcement of the *Postbaccalaureate Bylaw* in this case is an unreasonable restraint of trade.

Moreover, the final prong is met because intercollegiate athletics and the denial of eligibility to a student athlete affect interstate commerce. The broader burden on trade under the Sherman Act conforms with that under the Commerce Clause. *Fuentes*, 946 F.2d at 200 (citing *Hospital Building Co. V. Trustees of Rex Hospital*, 425 U.S. 738, 743, 96 S.Ct. 1848, 1851 (1976); *Cardio-Medical Assoc. v. Crozer-Chester Medical Ctr.*, 721 F.2d 68 (3d Cir. 1983)). Under this theory, the relevant aspects may relate to the activities of the defendant rather than the plaintiff, and the

court should "examine the defendant's conduct both as it affects interstate commerce through the person of the plaintiff and as it affects commerce independently." *Cardio-Medical Assoc.*, 721 F.2d at 72-73, 75. In satisfying the jurisdictional requirement, the defendant's anticompetitive conduct must have a "not insubstantial effect on the interstate commerce involved." *Fuentes*, 946 F.2d at 200 (quoting *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511(1980)).

In the second count of the complaint, the said universities, which are recipients of federal funds, enforcement of a decision which engaged a pattern and practice of discrimination on the basis of sex to preclude Plaintiff from participating in an educational program or activity receiving federal funds places the schools in violation of 20 U.S.C. §1681. Finally, the universities have denied the direct obligations assumed in the NCAA Constitution and Bylaws to benefit and enhance the educational process with intercollegiate athletics and possibly violated a direct contractual agreement if the student-athlete is a party to the agreement. Therefore, Hofstra University and the University of Pittsburgh satisfy the test for "permissive joinder" and should be joined as "proper

parties" under rules 20 and 15.

This Court must permit the amendments to the complaint and the joinder of additional defendants. Accordingly, the Court should review and modify its order to grant Defendant's Motion to Dismiss and reinstate the pending Motion for Disqualification Due to Conflict of Interest.

Respectfully Submitted,

s/ Renee M. Smith
Renee M. Smith, *Pro Se Plaintiff*
P.O. Box 2334
Wintersville, OH 43953
(614) 264-6986

Bylaw 14.1.7 Graduate Student/Postbaccalaureate Participation

A student-athlete who is enrolled in a graduate or professional school of the institution he or she previously attended as an undergraduate (regardless of whether the individual has received a U.S. baccalaureate degree or equivalent), a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution, or a student-athlete who has graduated and is continuing as a full time student at the same institution while taking courses that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in the intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable 5 year or 10 semester period set forth in 14.2 (Revised: 1/10/90 and 1/10/93 effective 8/1/93).

Bylaw 14.1.7.1 One-Time Transfer Exception

A graduate student who is enroll in a graduate program or professional school of an institution other that the institution he or she previously attended as an undergraduate may participate in intercollegiate athletics if the student fulfils the conditions of the one-time transfer exception set forth in 14.5.5.3.11 and has eligibility remaining per 14.2 (adopted 1/9/96 effective 8/1/96 for those student-athletes who transfer to the certifying institution on or after 8/1/96.)

those student-athletes who transfer to the certifying institution on or after 8/1/96.)

Bylaw 14.5.5 Four-Year College Transfers

* * *

Bylaw 14.5.5.3 Exceptions or Waivers for Transfers From Four-Year Colleges

A transfer student (other than one under disciplinary suspension per 14.5.1.4) from a four-year institution is not subject to the residence requirement for intercollegiate competition, provided the student does not have an unfulfilled residence requirement at the institution from which he or she is transferring. * * *

Bylaw14.5.5.3.11 One-Time Transfer Exception

The student transfers to the certified institution from another four-year collegiate institution and all of the following conditions are met (for graduate students see also 14.1.7.1):

(a) The student is a participant in a sport other than Division I basketball, Division I-A football or Division I men's ice hockey, at the institution to which the student is transferring. A participant in Division I-AA football at the institution to which the student is transferring may utilize this exception only if the participant transferred to the certifying institution from an institution that sponsors Division I-A football;

(Revised: 1/16/93 effective 8/1/93, Revised: 1/11/94, 1/10/95)

(b) The student has not transferred previously from one four-year institution unless, in the previous transfer, the student-athlete received an exception per 14.5.5.3.7 (discontinued/nonsponsored sport exception); (Revised: 1/11/94, 1/11/97)

(c) The student is in good academic standing and meets the satisfactory-progress requirements. The transferring student must be one who would have been academically eligible had ha or she remained at the institution from which the student transferred, and he or she also must be eligible at the certifying institution as a regularly enrolled, full-time, degree-seeking student who was admitted in accordance with the regular, published entrance requirements of the institution. In Division I, the student shall bot be required to fulfill the necessary percentage-of-degree requirements per 14.4.3.2.1 and 14.4.3.2.2 at the previous institution; (Revised: 1/10/95, 1/9/96)

(d) The student's previous institution certifies in writing that it has no objection to the student's being granted an exception to the transfer residence requirement. If the student's previous institution denies his or her request for the release, the institution shall inform the student-athlete in writing

that he or she, upon request, shall be provided a hearing conducted by an institutional entity or committee outside of the athletics department (e.g., the office of student affairs; office of the dean of students; or a committee composed of the faculty athletics representative, student-athletes and nonathletics faculty/staff members). The institution shall have established reasonable procedures for promptly hearing such a request; and (Revised: 1/11/94)

(e) If the student transfers to the certifying institution from a Division III member institution and meets the foregoing conditions, he or she may be eligible to compete but shall not receive athletically related financial aid during the first academic year in residence at the certifying institution.

National Collegiate Athletic Association
6201 College Boulevard.
Overland Park, Kansas 66211-2422
(913) 339-1906

November 16, 1995

Ms. Renee M. Smith
3812 Bates Street
Bates Hill Apartment No. 207
Pittsburgh, Pennsylvania 15213

Dear Ms. Smith:

Thank you for your recent letter concerning NCAA legislation.

There has not been any change in NCAA legislation concerning graduate student eligibility. Several more appeals have been submitted, and there continues to be some interest in changing the legislation. Even if that occurs, however, it does not appear it would assist anyone earlier that the 1996-97 academic year.

I am sorry I do not have better news.

Sincerely,

s/ S. David Berst

S. David Berst

Assistant Executive Director

for Enforcement and Eligibility

Appeals

SDB:aj

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari has been served upon counsel of record by United States Main, first-class service, postage prepaid this 16th day of July, 1998.

Renee M. Smith
Pro Se Petitioner
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

John J. Kitchin, Esq.
922 Walnut
Suite 1500
Kansas City, MO 64106

Mary J. Hackett, Esq.
Kimberly J. Koerner
435 Sixth Ave.
P.O. Box 2009
Pittsburgh, PA 15230-2009

University of Pittsburgh
University Counsel
Attn.: Susan L. Wormer
3200 Cathedral of Learning
Pittsburgh, PA 15260

Hofstra University
Mr. James McCue
Vice President for Business Affairs
Philips Hall - Room 101A
Hempstead, NY 11549

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No. 98-107

In the Supreme Court of the United States

OCTOBER TERM, 1998

R.M. SMITH,
PETITIONER,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELSA KIRCHER COLE
General Counsel
The National Collegiate Athletic Association
6201 College Boulevard
Overland Park, KS 66211

GREGORY L. CURTNER
Miller, Canfield, Paddock and Stone, P.L.C.
156 W. 56th Street
19th Floor
New York, NY 10019

ROY T. ENGLERT, JR.*
DONALD M. FALK
DAVID A. J. GOLDFINE
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

**Counsel of Record*

QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner failed to state a claim for relief under the antitrust laws when she alleged that a bylaw of the National Collegiate Athletic Association prevented her from competing in intercollegiate athletics after she graduated from college.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. The National Collegiate Athletic Association does not have any parent companies or non-wholly-owned subsidiaries.

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7 PHILLIP E. AREEDA, ANTITRUST LAW (1986) 6

In the Supreme Court of the United States

OCTOBER TERM, 1998

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R.M. SMITH,
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v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

The petition does not present any basis for this Court to review the Third Circuit's routine application of settled antitrust law to the complaint in this case. The court of appeals held that petitioner's complaint did not state a claim under the antitrust laws for *two* reasons: (1) student-athlete eligibility rules that relate solely to enrollment status rather than to economic factors do not constitute restraints of trade within the meaning of the antitrust laws; and (2) even if the rules were accorded antitrust scrutiny, the allegations in petitioner's complaint would not make out a violation of the antitrust laws under the rule of reason. The petition does not come to grips with the Third Circuit's straightforward rule-of-reason analysis that weighed petitioner's complaint and found it wanting. That analysis disposes of this case, so that a grant of certiorari on the questions posed by the petition could not affect the judgment.

STATEMENT

1. Respondent National Collegiate Athletic Association (NCAA) is an unincorporated, nonprofit association of more than 1100 colleges, universities, and athletic conferences engaged in intercollegiate athletic competition. This Court has recognized the NCAA's "critical role in the maintenance of a

revered tradition of amateurism in college sports." *NCAA* v. *Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 120 (1984). In carrying out that function, the NCAA adopts and enforces bylaws and other rules governing such matters as the conduct of athletic events, the recruitment and eligibility of student-athletes, and academic standards. See *id.* at 101-102.

NCAA bylaws generally restrict participation in intercollegiate athletics to full-time undergraduate students, who may compete during four athletic seasons within a five-year period. Pet. App. 3a n.1. Student-athletes who graduate from college before exhausting their eligibility may compete for their undergraduate institution if they are enrolled in graduate school there. Until August 1996, NCAA Bylaw 14.1.8 ("Postbaccalaureate Bylaw" or "Bylaw") prohibited a student-athlete from participating in intercollegiate athletics for a postgraduate institution other than her undergraduate school. *Id.* at 5a n.2.

Petitioner entered St. Bonaventure University in fall 1991 and played intercollegiate volleyball during the 1991-92 and 1992-93 seasons. Pet. App. 4a. She chose not to compete during the 1993-94 season, and graduated halfway through that academic year. *Ibid.* St. Bonaventure did not offer the courses of postgraduate study that interested petitioner. *Id.* at 4a-5a. Accordingly, she enrolled in a postgraduate program at Hofstra University in fall 1994 and the next year enrolled in another postgraduate program at the University of Pittsburgh. *Ibid.*

Because of the Postbaccalaureate Bylaw, petitioner was not eligible to play intercollegiate volleyball for Hofstra or Pittsburgh. Pet. App. 5a-6a. Although both schools asked the NCAA to waive the Bylaw for petitioner's benefit, the NCAA declined. *Id.* at 5a. In January 1996, however, the NCAA amended the Bylaw to broaden the eligibility of graduate students who enrolled at institutions other than their undergraduate schools. See Pet. 12, 29. The new Bylaw applies to enrollments after August 1, 1996. Pet. App. 87a. Petitioner does not

state whether she asked the NCAA to waive the five-year rule so that she could take advantage of the amended Bylaw.

2. In August 1996, petitioner filed this action in the United States District Court for the Western District of Pennsylvania. Pertinent here is petitioner's claim that the Postbaccalaureate Bylaw unreasonably restrained trade in violation of Section 1 of the Sherman Act. See Pet. App. 6a. Petitioner also asserted a claim of sex discrimination under Title IX, 20 U.S.C. § 1681, and a contract claim.

The district court dismissed the case for failure to state a claim on which relief could be granted. Pet. App. 36a. See Fed. R. Civ. P. 12(b)(6). In particular, the district court held that the Sherman Act did not apply to NCAA athletic eligibility rules such as the Postbaccalaureate Bylaw. Pet. App. 33a-36a.

The Third Circuit unanimously affirmed in relevant part, although it reinstated the Title IX claim. Pet. App. 1a-24a.[1] The court of appeals agreed that the Postbaccalaureate Bylaw did not fall within the scope of the Sherman Act because "the NCAA's eligibility rules [including the Postbaccalaureate Bylaw] * * * are not related to the NCAA's commercial or business activities." *Id.* at 10a-11a.

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[1] The district court had dismissed the Title IX claim on the ground that Title IX does not apply to the NCAA because it does not receive federal funding. Pet. App. 37a-42a. The Third Circuit, despite acknowledging that the NCAA itself receives no federal funds, reversed on the ground that the NCAA may be an indirect beneficiary of its member institutions' receipt of federal funding. *Id.* at 15a-19a. As the NCAA has demonstrated in its petition for a writ of certiorari in No. 98-84, the Third Circuit's Title IX holding is irreconcilable with *United States Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597 (1986), conflicts with decisions of other courts of appeals, and creates grave practical problems. The Court should grant certiorari to review the Third Circuit's Title IX holding. As is evident on the face of the present petition, however, there is no overlap at all between the Title IX issue and the antitrust issue petitioner raises, and thus no reason why the pendency of the NCAA's petition raising the Title IX issue should affect or delay the disposition of the present petition.

The Third Circuit also affirmed the dismissal on an alternative, independent basis. Assuming that the Sherman Act applied to the Postbaccalaureate Bylaw, the court of appeals held that the complaint failed to state a claim that the Bylaw violated the antitrust laws. Pet. App. 14a. The court of appeals concluded that, on its face, the Bylaw "clearly survives a rule of reason analysis" because it "is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Ibid.* The Third Circuit held that the Bylaw plainly discouraged gamesmanship by graduate institutions and athletes alike by removing incentives to manipulate athletes' participation as undergraduates (and thus their eligibility) in order to "preserve [their] eligibility on a postbaccalaureate basis at another institution." *Ibid.*

ARGUMENT

The petition marshals three sets of reasons why petitioner's complaint allegedly should be evaluated under the rule of reason. But the Third Circuit *did* evaluate the complaint under the rule of reason (see Pet. App. 11a-14a), and the court of appeals held that the complaint failed to state a claim. Petitioner identifies no conflict among the circuits and provides no other justification for this Court to review the rule-of-reason holding, which fully and correctly disposes of petitioner's antitrust claim. Accordingly, it would be pointless to review the Third Circuit's alternative conclusion that the Postbaccalaureate Bylaw was not subject to the antitrust laws because it was "not related to the NCAA's commercial or business activities." *Id.* at 10a. In any event, the Third Circuit neither erred nor created a conflict among the courts of appeals when it placed the Bylaw beyond the scope of the antitrust laws. The petition should be denied.

1. Whatever the merits of petitioner's attacks on the Third Circuit's threshold determination that the antitrust laws do not apply to enrollment-based eligibility decisions, resolution of that issue would not affect the disposition of this case.

The court of appeals also held that the complaint failed to state a claim for relief under the antitrust laws. See Pet. App. 11a-14a. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)). The judgment would be unaffected so long as the Third Circuit's holding under the rule of reason remained in place.

Yet the petition does not squarely challenge the Third Circuit's dispositive holding under the rule of reason, and offers no ground for this Court to review it. The third question presented in the petition asks only whether the rule of reason applies at all, Pet. i, but resolving that question in the affirmative — as petitioner seems to urge (see Pet. 27-29) — would not disturb the judgment below. The Third Circuit *applied* the rule of reason, and found petitioner's complaint wanting under that analysis. See Pet. App. 11a-14a.

Petitioner provides no legal authority to contradict the Third Circuit's rule-of-reason analysis, much less to show a conflict among the circuits. Petitioner does not question the Third Circuit's statement of the legal standard, but merely suggests in one paragraph that the NCAA could have achieved its goals in other ways. Pet. 29. At most, that objection amounts to a claim that the court of appeals "misappli[ed] * * * a properly stated rule of law," an inadequate ground for certiorari. S. Ct. R. 10.

In any event, the Third Circuit's analysis under the rule of reason was unquestionably correct in light of this Court's decision in *Board of Regents*. In that case, the Court recognized that "the NCAA plays a vital role in enabling college [athletics] to preserve [their] character, and as a result enables a product to be marketed which might otherwise be unavailable." 468 U.S. at 102. The Court defined that "product" as a "particular brand" of athletic competition "identifi[ed] * * * with an academic tradition." *Id.* at 101.

The Court was unanimous in recognizing the NCAA's eligibility requirements as procompetitive actions that furthered its "vital role." 468 U.S. at 102. The Court noted that "rules defining * * * the eligibility of participants" were among the "regulatory controls of the NCAA" that "are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id.* at 117. The Court explicitly identified rules tied to athletes' enrollment status (such as the "require[ment] to attend class") as "procompetitive." In support of that statement, the Court prominently cited three district court cases that had upheld eligibility requirements and related sanctions under the rule of reason. *Id.* at 102 n.24 (citing *Justice* v. *NCAA*, 577 F. Supp. 356, 379-383 (D. Ariz. 1983); *Jones* v. *NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975); and *College Athletic Placement Service, Inc.* v. *NCAA*, 1975-1 Trade Cas. ¶ 60,117 (D.N.J), aff'd mem., 506 F.2d 1050 (3d Cir. 1974)). The dissenting opinion pointedly noted that no one "questions the validity * * * under the Rule of Reason" of NCAA rules that "pervasively regulated * * * student eligibility." *Id.* at 123 (White, J., dissenting).[2]

The message of *Board of Regents* — that the NCAA unquestionably "needs ample latitude to play" its "critical role" (468 U.S. at 120) — has been clearly understood by all of the courts of appeals that have evaluated NCAA eligibility requirements under the rule of reason. Like the Third Circuit in this case, other courts of appeals have affirmed Rule 12(b)(6) dismissals of antitrust challenges. The Fifth Circuit affirmed with "little difficulty" the dismissal of an antitrust challenge to the NCAA's rules limiting compensation to athletes. *McCormack* v. *NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988). Equally deficient, in the Seventh Circuit's view, was a complaint attacking the rules forbidding athletes to retain agents or enter

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[2] A leading commentator also has noted the competitive "virtues" of these rules. 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 432 (1986).

professional drafts. See *Banks* v. *NCAA*, 977 F.2d 1081, 1087-1094 (7th Cir. 1992).

Nothing in petitioner's complaint separates this case from the sound authority uniformly rejecting similar antitrust challenges to the NCAA's eligibility requirements. Petitioner, in fact, presents an even weaker case for antitrust condemnation of an NCAA eligibility rule than did the plaintiffs in *Banks* and *McCormack*. However weak their arguments may have been, those plaintiffs at least crossed the threshold of showing that the NCAA rules at issue precluded unfettered economic competition for the sale of athletes' services. The restriction in this case, by contrast, has nothing to do with economic benefits or economic competition, and its effect even on athletic competition (as opposed to individual competitors) was negligible. The restriction, moreover, is tightly linked to the identification of college sports with an *undergraduate* "academic tradition," *Board of Regents*, 468 U.S. at 101-102, and the NCAA's purpose of "provid[ing] an opportunity for competition among amateur students pursuing a *collegiate* education." *Banks*, 977 F.2d at 1090 (emphasis added). Given the total absence of any anticompetitive economic effect, the Third Circuit correctly determined that the NCAA's legitimate justifications for the Postbaccalaureate Bylaw would easily prevail in any rule-of-reason balancing.

The Third Circuit correctly observed (Pet. App. 11a n.4) that this case can readily be distinguished from *Law* v. *NCAA*, 134 F.3d 1010 (10th Cir. 1998), petition for cert. pending, No. 97-2004, which involved a salary restriction with potentially significant economic effects rather than an athlete eligibility rule. There is therefore no reason to hold this case pending disposition of the petition in *Law*, and indeed petitioner does not invoke *Law* in support of her position. Nevertheless, it is instructive to compare the decision below, where the court correctly understood *Board of Regents* to support the NCAA's broad latitude under the antitrust laws to regulate inputs to athletic competition, with *Law*, where the court misunderstood

Board of Regents so severely that it described a modest restraint on one input as "nearly identical" to the direct output limitation condemned in *Board of Regents*. 134 F.3d at 1020. The two recent decisions, taken together, demonstrate that, after 14 years, this Court's *Board of Regents* decision requires further clarification. For the reasons stated in the NCAA's petition for a writ of certiorari in *Law*, that case is an appropriate vehicle for the necessary clarification. This case is not.

2. The Third Circuit's alternative and independent determination that the Sherman Act does not apply to non-economic eligibility rules such as the Postbaccalaureate Bylaw provides no sounder basis than its rule-of-reason holding for this Court's review of this case. That determination, too, does not conflict with the holding of any other court of appeals.

The Third Circuit correctly observed that "no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules." Pet. App. 10a. Petitioner's contrary assertion cannot withstand scrutiny.

Petitioner claims (Pet. 14) that the alternative holding below conflicts with the decision of the Fifth Circuit in *McCormack*, 845 F.2d 1338. But the Fifth Circuit explicitly declined to decide whether the antitrust laws applied to the NCAA's eligibility rules. *Id.* at 1343. Like the Third Circuit (see Pet. App. 11a-14a), however, the Fifth Circuit "[a]ssum[ed] * * * that the antitrust laws apply to the eligibility rules" and affirmed a dismissal under Rule 12(b)(6) for failure to state an antitrust claim. 845 F.2d at 1343.

Likewise, the Third Circuit's view of the scope of the Sherman Act does not conflict with *Hairston* v. *Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996). See Pet. 11-12. The antitrust claim in *Hairston* challenged *sanctions* that reduced a college's revenues from bowl games and television, not the recruiting rules that the college violated. See 101 F.3d at 1317. The Ninth Circuit rejected that claim on the merits. The

economic impact of the sanctions on the university was patent, whereas petitioner here offers only attenuated and non-antitrust-related theories of how the application of eligibility rules to her had any economic impact (Pet. 19-20 & n.4). She resorts to arguing that intercollegiate athletics "taken as a whole * * * has a very substantial impact on interstate commerce" (*id.* at 18), which of course is true, but it hardly follows that the antitrust laws were meant to regulate eligibility rules without any substantial commercial character. In any event, eligibility rules simply were not at issue in *Hairston*, and the NCAA prevailed on the challenges to the rules and sanctions that were at issue.

In this case, the Third Circuit correctly adhered to this Court's textually rooted assertions that the Sherman Act regulates only conduct that may restrain *trade*, *i.e.*, conduct that is commercial in nature and economic in effect. See Pet. App. 8a-9a; cf. 15 U.S.C. § 1. The antitrust laws condemn "restraints to * * * competition in *business and commercial transactions.*" Pet. App. 9a (emphasis added) (quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-493 (1940)). Courts of appeals have recognized that the antitrust laws do not extend to the *non*commercial actions of nonprofit organizations. *United States* v. *Brown Univ.*, 5 F.3d 658, 665-666 (3d Cir. 1993); *Marjorie Webster Junior College* v. *Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 653-655 (D.C. Cir. 1970). See 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 262a, at 269-271 (rev. ed. 1997).

Moreover, contrary to petitioner's contention (Pet. 9-11), the Third Circuit's view draws *support* from *Board of Regents*. This Court reiterated that the Sherman Act is "a comprehensive charter of *economic* liberty" that preserves competition as a "rule of *trade*." 468 U.S. at 104 n.27 (emphasis added) (quoting *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958)); see *id.* at 133 (White, J., dissenting) (Sherman Act is aimed at conduct having "commercial objectives"). *Board of Regents* involved only *price* and *output* restrictions on television

broadcasts of the *output* of intercollegiate athletic contests — not a *non-economic* limit on the eligibility of athletes to participate as *inputs* to those contests. The Court repeatedly drew these distinctions. See 468 U.S. at 101-103, 117-119.

In making the contrary argument, petitioner misrepresents this Court's opinion in *Board of Regents*. Petitioner asserts that the Court *silently* "approve[d] the Sherman Act's applicability" to *all* "NCAA bylaws." Pet. 9-10 (citing 468 U.S. at 102 & n.24). In fact, however, this Court simply emphasized the *pro*competitive aspects of the NCAA's eligibility rules; in footnote 24, without further comment, the Court cited three district court decisions holding that the rules were indeed procompetitive. *None* of those decisions held that the Sherman Act applied to eligibility rules, but *two* of them held that it did *not* apply. See *Jones*, 392 F. Supp. at 303; *College Athletic Placement*, 1975–1 Trade Cases ¶ 60,117, at 65,267.

Even if the Sherman Act might apply to some eligibility rules, the Postbaccalaureate Bylaw is especially devoid of commercial or economic character.[3] The NCAA's determination to draw the limits on post-graduate eligibility where it did does not affect the compensation of athletes or their ability to seek future compensation without forfeiting current eligibility. The Third Circuit correctly concluded that the Bylaw was too distantly related to "trade or commerce" to constitute a "restraint of trade or commerce" within the meaning of the Sherman Act. 15 U.S.C. § 1.

3. The bulk of the petition (Pet. 16-27), loosely linked to the second question, advances a mélange of additional arguments challenging the Third Circuit's determination that the

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[3] Petitioner's attempt to separate the Sherman Act from its commercial and economic moorings is plainly misguided. If her view were law, illiterate students could assert antitrust claims against colleges that, through their association with accrediting authorities, agreed to admit and graduate only students who could read and write — a restriction that, like the Bylaw challenged here, would deny a privilege based on a collective determination.

Bylaw was not subject to antitrust scrutiny. Those broad discussions address topics covered tangentially or not at all in the decision below. The court of appeals held only that the specific *action* of the NCAA that petitioner challenged was not a restraint of trade within the scope of the antitrust laws and did not violate those laws even if it *was* within their scope. The court did not pass on petitioner's standing or the nature of her injury, and did not dispute that the NCAA acts in interstate commerce. "The question which we now face is different; it is whether antitrust laws apply only to the alleged infringer's commercial activities." Pet. App. 8a. Because petitioner's second question is not germane to the judgment below, it does not present any issue that this Court *could* review.

4. Finally, this case is a poor vehicle for this Court's review of *any* antitrust issue. This is essentially a case of first impression: neither the parties nor the court of appeals could identify "any opinion addressing" the validity under the rule of reason of the "particular bylaw at issue here." Pet. App. 13a. And the resolution of the validity of the superseded Post-baccalaureate Bylaw would have no practical effect; as petitioner admits (at 12, 29), the Bylaw that she challenged has been amended to her liking.[4]

---

[4] The amendment of the Bylaw in no way alleviates the need for plenary review of the question whether the Third Circuit properly held that the NCAA is subject to Title IX. See note 1, *supra*. That ruling rested entirely on the Third Circuit's flawed conclusion that, because the NCAA receives dues from member institutions that in turn receive federal funds, the NCAA itself is a federal funding recipient within the terms of Title IX. The Third Circuit's ruling with respect to the coverage of Title IX is by no means limited to or by the specific bylaw at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELSA KIRCHER COLE
General Counsel
The National Collegiate Athletic Association
6201 College Boulevard
Overland Park, KS 66211

GREGORY L. CURTNER
Miller, Canfield, Paddock and Stone, P.L.C.
156 W. 56th Street
19th Floor
New York, NY 10019

ROY T. ENGLERT, JR.*
DONALD M. FALK
DAVID A. J. GOLDFINE
Mayer, Brown & Platt
2000 Pennsylvania Ave. NW
Washington, DC 20006
(202) 463-2000

**Counsel of Record*

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

RENEE M. SMITH
P.O. BOX 2334
WINTERSVILLE, OH 43953
(740) 264-6986
Pro Se Petitioner

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QUESTION PRESENTED

Whether the Third Circuit improperly decided that the Postbaccalaureate Bylaw was a reasonable restraint of trade and commerce where the court omitted the third step of the rule of reason to determine if any legitimate goals could have been achieved in a substantially less restrictive manner when the NCAA could have regulated the transfer of graduate student-athletes rather than completely exclude them from participating in intercollegiate athletics?

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No. 98-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

R. M. SMITH,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioner respectfully requests that this Court grant the petition because the NCAA's denial of Petitioner's athletic-eligibility restrains trade and commerce in violation of the antitrust laws. To determine if the restraint is unreasonable, courts utilize the rule of reason, which is a three part test. See I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, at 53 (4th ed. 1997) (citing cases). The Third Circuit omitted the necessary third step of the test, which is an incorrect statement of law. Thus, the lower court's determination that the Postbaccalaureate Bylaw is reasonable was improper.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT IMPROPERLY STATED THE RULE OF REASON BY OMITTING THE INQUIRY INTO WHETHER ANY LEGITIMATE GOALS COULD HAVE BEEN ACHIEVED IN A SUBSTANTIALLY LESS RESTRICTIVE MANNER.

To determine if the alleged infringer's actions violate the Sherman Act courts utilize the rule of reason to focus "on the challenged restraint's impact on competitive conditions." National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978). Competition is assumed to be the best method to allocate resources and to produce the best products and services and lowest prices. Id., at 695. In this analysis, inquiring into whether the competition is good or bad is precluded. Id.

The rule of reason is *three* part test with shifting burdens of proof. See I ABA Section of Antitrust Law, Antitrust Law Developments, at 53 (4th ed. 1997) (citing cases) (emphasis added). First, the plaintiff has the burden to demonstrate evidence of the defendant's market power or actual anticompetitive effects. See Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998), *petition for cert. pending, No. 97-2004*; Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1996); Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996); United States v. Brown

University, 5 F.3d 658, 668 (3d Cir. 1993); see also I ABA Section of Antitrust Law, supra, at 53, 55 (citing cases). Then, the burden shifts to the defendant to show that the alleged infringing conduct promotes a procompetitive objective. See Law, 134 F.3d at 1019; Clorox, 117 F.3d at 56; Hairston, 101 F.3d at 1319; Orson, 79 F.3d at 1367-68; Brown Univ., 5 F.3d at 669; see also I ABA Section of Antitrust Law, *supra*, at 53, 66 (citing cases). To prevail, the plaintiff must show that the restraint is not reasonably necessary to achieve the stated objective or the goal could have been achieved in a substantially less restrictive manner. See Law, 134 F.3d at 1019; Clorox, 117 F.3d at 56; Hairston, 101 F.3d at 1319 (finding that the players were unable to produce any evidence that the legitimate goals could have been achieved in a substantially less restrictive manner); Orson, 79 F.3d at 1368; Brown Univ., 5 F.3d at 669; see also I ABA Section of Antitrust Law, *supra*, at 53, 66 (citing cases).

The Third Circuit explained that the Postbaccalaureate Bylaw achieves the legitimate goal of "permit[ting] survival of amateur athletics and an even playing field." Pet. App. 14a. The court, however, did not address the third prong of the rule of reason to determine if this goal could have been achieved in a less restrictive manner. Thus, the Third Circuit misstated a rule of law by omitting a necessary step in the analysis.

Under the proper analysis, Petitioner's complaint should

not have been dismissed for failure to state a claim because she alleges that significantly less restrictive alternatives could have been utilized. See Pet. App. 50, ¶28. During Petitioner's denial of eligibility, other NCAA bylaws provided rules for governing student-athlete transfers from two-year schools to four-year schools and between four-year schools (Pet. App. 72a-77a), but provided for blanket denial of eligibility to graduate students who transferred to other schools (Pet. App.87a).

To evidence a less restrictive alternative, NCAA has since changed the bylaw to permit graduate students who transferred to the new institution on or after August 1, 1996 to transfer and remain eligible when rules regulating the other transfers are followed. See Pet. App. 87a-88a. Under the rules governing non-graduate transfer students, the athletic director at her undergraduate school would have to release a student's eligibility to participate at another institution in the first year after transferring. If eligibility is not released, a student-athlete is required to "sit out" of competition for one year before regaining eligibility. Thus, the NCAA could have achieved any legitimate goals through this limited regulation, which is a substantially less restrictive alternative than completely eliminating graduate students from participation in intercollegiate athletics and competition for scholarship awards.

Respondent's claim (Br. Opp. 7) that "[t]he restriction . . . is tightly linked to the identification of college sports with an undergraduate 'academic tradition,'" must fail for two primary reasons. First, the NCAA does not limit is participants to only undergraduate students; graduate students are eligible to compete in intercollegiate athletics but only at their undergraduate degree conferring institution. See 1.3 Fundamental Purpose (Pet. App. 69a-70a); 14.1.8.2 Postbaccalaureate (Pet. App. 70a). Second, the NCAA's basic purpose in maintaining intercollegiate amateur athletics is to be "an integral part of the educational program," and this is exactly the activity in which graduate students participate. See 1.3.1 Basic Purpose (Pet. App. 69a).

Next, the NCAA incorrectly contends (Br. Opp. 8-9) that Petitioner suffered no economic harm. Here, the Petitioner suffered an individual economic impact through the loss of scholarship opportunity.[1] Similar to when football players were denied eligibility, the court analyzed the players' limitation of scholarships and denial of a right to compete in the coveted

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[1]Athletes can receive a full scholarship which pays for all tuition, room, board, books, and other expenses. In 1995-1996, the University of Pittsburgh women's volleyball team had twelve full scholarships but only eleven team members on the roster. Thus, the denial of Petitioner's opportunity to obtain scholarship for this particular year had an obvious adverse impact greater than $20,000 after tax or $30,000 pre-tax.

post-season bowls to determine that significant anticompetitive effects resulted rather than from the perspective of the university's revenue reduction. Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996).

In Law, *supra*, the NCAA restricted part-time coaching salaries to $16,000 per year. Similar to Petitioner's denial of eligibility which artificially increased her tuition cost, the coaches were prevented from receiving thousands of dollars for their services, and the price for coaching services were artificially lowered. Id., at 1020. After analyzing the restraint's impact in conjunction with the legitimate goals of retaining entry level positions, reducing costs, and maintaining competitiveness, the Tenth Circuit determined that the NCAA violated the antitrust laws because the imposed restriction neither was the least restrictive method nor proven to necessarily achieve these goals. Id., at 1021-24.

Thus, this Court should grant Petitioner's Writ because the Third Circuit's alternative basis for granting dismissal of the complaint is incomplete and incorrect.[2] Moreover, the proper analysis affects the disposition of the case.

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[2] As discussed (Pet. 8-23), student-athletes are persons in commerce, and when taken as a whole, they have a substantial impact on interstate commerce. Thus, the primary basis for the lower court's opinion to exempt the NCAA's regulation of student-athletes is incorrect, and this regulation is subject to antitrust scrutiny.

II. THE THIRD CIRCUIT'S EXCLUSION OF A STUDENT ATHLETE'S ELIGIBILITY CONFLICTS WITH THIS COURT AND OTHER CIRCUITS AND PRESENTS AN IMPORTANT UNANSWERED QUESTION.

The NCAA recognizes (Br. Opp. 6) that this Court approves of regulatory controls that *foster* competition. See NCAA v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 117 (1984). Here, however, the NCAA is destroying competition by eliminating a student-athlete for academic achievement. Requirements to attend class and maintain a minimum grade point average are academic prerequisites uniquely tied to being a student-athlete in intercollegiate athletics. See Br. Opp. 6. Denying a student athlete's eligibility because she advanced into graduate programs in 2.5 years in not a reasonable restriction to protect the existence of the product.

Although other courts may not have addressed the specific bylaw at issue here, the denial of student-athlete eligibility and scholarship based on NCAA bylaws has been reviewed by other circuit courts. See Hariston, *supra* (analyzing ban on post season bowl participation and reduction in scholarship based on bylaw infraction under rule of reason); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (addressing standing issue not determining if NCAA regulations of student-athletes exempted from antitrust regulation). See also Hairston v. Pacific 10 Conference, 893

F.Supp. 1485 (W.D.Wash. 1994); Justice v. NCAA, 577 F.Supp. 356 (D. Ariz. 1983); Gaines v. NCAA, 746 F.Supp. 738 (M.D. Tenn. 1990). These opinions conflict with the Third Circuit's blanket exemption from antitrust regulation.

To bolster the need for judicial scrutiny, even member institutions have acknowledged that too many bylaws exist. "We have far too many rules," said Jim Delaney, who is the Big Ten Conference Commissioner. Mark Asher and C. Jemal Horton, *NCAA Reassesses Future After $67 Million Judgment; Additional Lawsuits Could Alter College Sports*, WASH. POST May 12, 1998, E01. If the NCAA has been unable to govern itself and the courts will not intervene, the Association has no incentive *not* to serve its own interests to the detriment of intercollegiate athletics.

CONCLUSION

The petition for writ of certiorari should be granted to ensure that intercollegiate athletics is the best product and students are not denied thousands of dollars in athletic scholarship. The Third Circuit incorrectly surmised its decision on a limited pre-discovery record to grant the NCAA a complete exemption from antitrust scrutiny in regulating student-athletes. Petitioner respectfully requests that this Court grant her writ to review the Third Circuit's analysis and resolve the conflicting circuit opinions.

Respectfully submitted,

RENEE M. SMITH
P.O. BOX 2334
WINTERSVILLE, OH 43953
(740) 264-6986
Pro Se Petitioner

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